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The Supreme Court of Minnesota in Francis v. Western Union Telegraph Co., in a well considered opinion by Judge Mitchell, refuse to follow the Texas doctrine to the effect that in an action against a telegraph company for failing to transmit and deliver a message, damages for mental suffering can be recovered. This doctrine was first announced in 1881, in So Relle v. Telegraph Co., 55 Tex. 308, which decision has, with more or less variations, been followed by the same court in a long line of later cases, but the doctrine seems to have involved that court in some very glaring inconsistencies, compelled, perhaps, by the necessities of the situation in which the court has placed itself. The multitude of cases of this character in that State since the decision of the So Relle Case indicates the vast field of speculative litigation opened up by that decision, and how difficult the subject is of control by the courts. In Rowell v. Telegraph Co., 75 Tex. 26, the court, apparently impatient at the amount of "intolerable litigation" to which the doctrine had given rise, seems to have gone back, partially at least, upon their former decisions. In that case the plaintiff had received information of the dangerous illness of his mother-in-law. A subsequent dispatch was sent, containing information of her improved condition. This dispatch the telegraph company failed to deliver. The court held that for continued mental anxiety caused by the non-delivery of the message the plaintiff could not recover. The "Texas doctrine," with more or less modification, has quite recently been adopted by the courts of Alabama, Kentucky, Tennessee, North Carolina, and Indiana. "The harvest of 'intolerable litigation' which is being reaped in Texas," remarks the Minnesota court, "has not yet matured in those States, but certainly will if the doctrine is adhered to. The 'Texas doctrine' has been favorably referred to in many of the more recent text-books, but the bench and bar will understand of how little weight as authority most of these books are, written as they very frequently are, by hired professional book makers of no special legal ability, and who are usually inclined to take up with the latest legal novelty for the same reasons that newspaper men are anxious for the latest news." On the other hand the doctrine has been vigorously repudiated by the courts of Georgia, Mississippi, Florida, Missouri, Kansas, Wisconsin, Dakota, Arkansas, also with practical unanimity by all the United States Circuit Courts which have passed upon the question. The Supreme Court of the United States has not yet been called on to pass upon the question; but, in view of the general tenor of the decisions of that court on kindred questions, there is every reason to believe that when the question is presented its decision will be that such damages are not recoverable. No lawyer as yet seems to have had the temerity to present such a case to a court of last resort in any of the eastern or northeastern States.

With reference to the principle involved Judge Mitchell wisely says that the Pandora box that has been opened by the "Texas doctrine" proves more forcibly than argument the wisdom of the common law rule that damages of this kind cannot be recovered in actions on contract. And, if damages of this kind are to be allowed for the breach of a contract of this character, where are we to stop? Upon what legal principle can a court refuse to allow them for the breach of any other contract? The breach of any contract —even the failure of a debtor to pay his debt at maturity—may result in more or less mental anxiety or suffering to the party to whom the obligation is due. Why not allow damages for the mental suffering or disappointment of passengers caused by the delay of trains through the negligence of the carrier? The object of the journeys of travelers is often not pecuniary, but to visit sick relatives or attend the funeral of deceased ones, which are matters affecting the feelings as much and as exclusively as a telegram. If the train is delayed through the negligence of the carrier, so that the passenger does not reach his destination in time to accomplish his desired object, why is he not entitled to damages for his disappointment and mental suffering as much as the sender or addressee of a delayed telegram? See Wilcox v. Railway Co., 3 C. C. A. 73, 52 Fed. Rep. 264.

The truth is, once depart from the old rule, and we are all at sea, without either rudder or compass."

NOTES OF RECENT DECISIONS.

CARRIERS OF PASSENGERS—RAILROAD COMPANY—PALACE CAR—EJECTION.—In the case of Duvall v. Pullman Palace Car Company, 62 Fed. Rep. 265, recently decided by the United States Circuit Court of Appeals for the Fifth Circuit, it appeared that the plaintiffs, having tickets for passage over a railroad, purchased from a palace car company a ticket for the drawing-room of one of its cars, part of a railroad train going to their destination; that before arriving there the train was turned back by the road officials, because of a washout on the road, and plaintiffs were ejected from the car by order of the conductor of the train, and that by contract between the palace car company and the railroad company the drawing-room car was operated and controlled by the railroad company. The court held that the plaintiffs could not recover damages from the palace car company as for breach of a contract to convey them to their destination, that company not being a common carrier of passengers for hire, and having made no contract to carry, its obligation being only to accommodate them with the drawing-room in its car so long as the carrier would convey it, and that in an action for damages evidence as to the relations existing between defendant and the railroad company respecting the car, and that the railroad officials ordered it to be turned back and plaintiffs to be put out, was admissible, as it did not vary the written contract between plaintiffs and defendant. The court said in passing on the case: "The defendant company is not liable as a carrier. It made no contract to carry. The plaintiffs had paid their fare to the railroad company, and were provided with first-class tickets entitling them to be carried from Denver to Forth Worth by it. It was the duty of the railroad company to convey them over its line, and they were being carried by it. The defendant's sleeping car constituted a part of the carrier's train. The plaintiffs secured the privilege of riding in this car by paying an additional sum to the defendant. The obligation of the defendant, under its contract with the plaintiffs, was to accommodate them with the drawing-room in its car, constituting a part of the carrier's train, as long as the carrier would convey it. If the carrier refused to convey it beyond Texline, and turned the car back to Denver, these were not the acts of the defendant company, and they would form no basis for the complaint against it in this suit."

PRACTICE IN CIVIL CASES—PARTIES TO ACTIONS—DECEIT IN SALE.—In Duncan v. Willis, 38 N. E. Rep. 13, decided by the Supreme Court of Ohio, it appeared that W, having knowledge that D and R were desirous of purchasing 30 to 40 head of hogs, each for separate use, represented to them that he had 100 head of the kind and quality they wanted. He would not sell in separate lots, but would sell in one lot, and the purchasers could divide them to suit themselves. He further represented that his hogs were sound, healthy, and free from disease, and that he had purchased them a few days before at $5 per 100 pounds. In fact, the hogs had been exposed to hog cholera, and where then infected with it, and had been purchased by W as diseased hogs, and for a sum much less than $5 per 100 pounds, all of which was well known to W, but unknown to the purchasers. Relying on the foregoing representations, the entire lot was purchased for $5.12 1-2 per 100 pounds, the two purchasers each to have 50 head as his separate and individual property, and to feed the same separately on their respective farms. The hogs were so divided immediately upon completion of the purchase. On the same day a number of them owned by D died from cholera, and the disease was communicated to his other hogs, some of which also died. It was held that D might maintain an action for damages against W for the deceit and fraud, without joining R or making him a party defendant. The following is from the opinion of the court:

The allegations of the petition in this case present a condition differing from the ordinary cause of action for breach of a joint contract, and this leads to an inquiry whether the case comes within the ordinary rule or falls within some recognized exception. A defendant may with great propriety insist, where he has made a sale to a number of purchasers, who, for anything appearing to the contrary, or to use the property jointly, or dispose of it on joint account, that

he should not be subjected to damages by two or more actions, for in such case it may fairly be said that he did not contemplate, and ought not to have contemplated, liability to each separately. He may also insist that the right of action be confined to the exact persons for whose benefit this contract was made. So it was held in Edward v. Owen, 15 Ohio, 500, that while an action on the case might be maintained against a debtor for representing himself insolvent, and thereby inducing his creditor to discharge a note for less than its value, yet it was error to instruct a jury that proof of false and fraudulent declarations thus made to other creditors would sustain a declaration counting upon representations made directly to the plaintiff. And in McCracken v. West, 17 Ohio, 16, it was held that "if a person write a letter to another, desiring him to introduce the bearer to such merchants as he may desire, and describing him as a man of property, and the person having such letter do not deliver it to the person to whom it is directed, but use it to obtain credit elsewhere, the person so giving the credit cannot maintain an action for deceit, though the representations in the letter are untrue." Also, in Wells v. Cook, 16 Ohio St. 67, it was held that, where the owner of a flock of sheep, apparently sound and healthy, but known to him to be diseased with a contagious malady, falsely and fraudulently represents them as sound and healthy to one known to be acting as the agent of a third person, and the agent confiding in such representations, buys them for his principal with the avowed purpose of mingling them with a large flock then belonging to the principal, whereby the united flock was infected, and, the agent and principal being still unaware of the existence of the disease, the agent buys the united flock from the principal, and suffers damage from the continued spread of the disease, he could not maintain an action against the seller for the deceit, the representations not having been made to him to induce him to act upon them in any manner affecting his own interests. In these cases it is manifest that there was an entire lack of privity betwen the several complaining parties and those accused of deceit, and hence there could be no right of action. Whatever liability would naturally attach to the deceit complained of, one thing was plain, and that was that the right to be compensated did not inure to the complaining parties. It could not be said in either case that the person guilty of fraud ought to have contemplated injury to the person complaining. Not so, however, in the case at bar. The plaintiff, being a party to the contract, was one of those necessarily within the contemplation of the defendant as likely to be injured by the fraud. Was he so related to the transaction as that the defendant should be held to have contemplated injury to him, separate and distinct from any possible injury to the other purchaser? To determine this, let us look at the contract. • • • It would seem that this contract of purchase, though joint in form, and based upon a consideration moving jointly from the two, was in spirit and essence, so far as it is involved in the present controversy, a separate contract as to each, and that the rights acquired under it by the purchasers were separate and distinct; that is to say, so far as the agreement of the sale, payment of the purchase price, and delivery were concerned, it was a joint contract, but the representations and the agreement of warranty entailed obligations for the performance of several duties to each. The contract belongs to that class which, although the agreement, in its inception, be entire, the performance is several, and therefore the contract, in its nature, divisible. This depends, as said by Lord Ellenborough in Ritchie v. Atkinson, 10 East, 295, "not on any formal arrangement of the words, but on the reason and sense of the thing as it is collected by the whole contract."

To arrive at a just conclusion we need but apply the ordinary rule that the damages to which the plaintiff is entitled are such as might have been supposed by the parties to be the natural result of a breach of the contract; such as might have been in their contemplation when the contract was made, having in mind the circumstances, and all the circumstances, known to them when they dealt. To urge, in the face of this well-established rule, that the obligation incurred by the representations and warranty was a joint obligation, and not a several one, is to contend against the plain import of the acts of the parties. It is, indeed, to say that no obligation at all was contemplated, and none incurred. This follows from the very nature of the circumstances. The parties could not have contemplated consequences involving joint damage to both purchasers because there could be no joint interest as to damages which might accrue from the deceit, for the property purchased was, by the terms of the contract, and from circumstances as well known to the defendant as to the plaintiff, to be divided at once, and thence used separately, and neither brother could have an interest in the damages sustained by the other. In such case it seems reasonable to hold that the contract is to be molded according to the several interests of the parties, and each recover only for a breach so far as his own interest extends; the rule being that, where the legal interest and cause of action is several, each may and should sue separately for the particular damage resulting to him individually, although the contract be, in its terms joint. The rule is stated by Parke, B., in Sorsbie v. Park, 12 Mees. & W. 157, in this way: "Suppose there were a covenant with A and B jointly that a certain thing should be done by the covenantor; both of those persons must sue. But where it appears on the face of the deed that A and B have several interests, they must sue separately; for, though the words be *prima facie* joint, they will be construed to be several if the interest of either party appearing upon the deed shall require that construction." In Sergeant Williams' note to Eccleston v. Clipsham, 1 Saund. 154, it is said: "So, though a man covenant with two or more jointly, yet, if the interest and cause of action of the covenantees be several, and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." See, also Thomas v. ——, Style, 461; Haddon v. Ayers, 28 L. J. Q. B. 105; Keightley v. Watson, 3 Exch. 716; Withers v. Bircham, 3 Barn. & C. 254; Servante v. James, 10 Barn. & C. 410; James v. Emery, 8 Taunt. 245; Carthrae v. Brown, 3 Leigh, 98; Ernst v. Bartle, 1 Johns. Cas. 319; Trustees v. Letcher, 1 T. B. Mon. 11; Ludlow v. McCrea, 1 Wend. 228; Jewett v. Cunard, 3 Woodb. & M. 277, Fed. Cas. No. 7,310. And that it is improper, as well at common law as under our code practice, for a party to be joined in a suit who has neither legal nor beneficial interest in its subject-matter, ought not to require authorities in its support. At least the letter, as well as spirit, of our Code leaves no doubt. The language of the section of Revised Statutes (5007) heretofore quoted implies that, where there is no unity of the interest, there can be no joinder, and the positive provision of section 4993 is that an action must be prosecuted in the name of

the real party in interest. Unless, therefore, it be made to appear that R. W. Duncan had an interest in the subject of the plaintiff's action, or in obtaining the relief demanded, or unless his presence was necessary to a final disposition of the controversy between plaintiff and defendant, it is not easy to perceive how he could be a necessary, or even a proper, party. This is not seriously claimed. Nor can it be said that his presence was necessary in order to exclude him from an interest in the damages claimed, because he had no interest to be excluded. To the contention that the defendant had the right to have him brought in so that the defendant's entire liability might be determined in one action, it would seem enough to say that no practical result could have been obtained by bringing him in. If he were a party, and no claim had been set up by him, his presence would have been at the best an idle ceremony; while, if he had set up a cause of action for like damages with that of plaintiff, it would have made a distinct issue, introducing confusion into the proceeding, and calling for a determination by the jury of separate claims for damage by one verdict. In no aspect of the case, as it seems to us, would substantial justice be advanced by the joinder of such separate actions. And if it should result that the defendant is compelled to answer a claim for damage to the stock of R. W. Duncan in another suit, his bad fortune may well be laid at his own door.

Perhaps an application to this case of ancient rules in their strictness might lead to a different conclusion, and probably cases may be found which sustain the judgment of reversal. The law, however, in this class of cases, has been much modified by modern decisions. Our search has not disclosed any case which can be said to be on all fours with the one under consideration. But we think the principle of Langridge v. Levy, 2 Mees. & W. 518, affirmed in 4 Mees. & W. 336, is applicable. The father of the plaintiff bought of the defendant a gun for the use of himself and his sons, the defendant then falsely and fraudulently warranting the gun to have been made by N, and to be a good, safe, and secure gun, while in fact, as the defendant then well knew, the gun was not made by N, nor was it a good, safe, or secure gun, but was made by an inferior maker, was bad, unsafe, dangerous, and wholly unsound. The gun was purchased on the faith of the representations and warranty. The plaintiff, knowing of and confiding in the warranty, used the gun, which, owing to its bad construction, burst, thus greatly injuring the plaintiff. Held, that the plaintiff (the son) could maintain the action, the defendant being held responsible "for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

ASSIGNMENT FOR BENEFIT OF CREDITORS—INSOLVENCY—CHATTEL MORTGAGE.—The Supreme Court of North Dakota in Cutter v. Pollock, 59 N. W. Rep. 1062, hold that an insolvent debtor may pay or secure one creditor in preference to another, except in cases where he executes an assignment for the benefit of his creditors. Such a debtor, in this case, executed three chattel mortgages on substantially all of his property, securing certain creditors to the exclusion of others. The mortgagees at once took possession, and commenced foreclosure of the mortgages. It was held, even assuming that the debtor himself knew that the consequence of giving the mortgages would be to prevent his continuing his bnsiness, that such transactions did not constitute an assignment for the benefit of creditors, within the meaning of section 4660, Comp. Laws, rendering void all preferences contained in such an assignment. Straw v. Jenks, 43 N. W. Rep. 941, 6 Dak. 414, overruled. Corliss, J., says:

It is here urged that the facts of this case bring it within the decision of the Territorial Supreme Court in Straw v. Jenks, 6 Dak. 414, 43 N. W. Rep. 941, and that that decision should be followed by this court. We are by no means satisfied that Pollock, when he executed these mortgages, had considered that he would no longer continue in business, and had decided to yield up dominion of his entire property. But we will again assume a state of facts as favorable to plaintiffs as the record will justify. We will take it for granted that Pollock intended to give these mortgagees a preference, knowing that the consequence of the execution of such mortgages, and the abandonment to the mortgagees of the possession of the mortgaged property would be to force him to abandon his business. But it is very clear that he did not intend to surrender control over the mortgaged property, except so far as was necessary to accomplish the payment of the mortgagees named therein. The mortgages created mere liens. The legal title to the property remained in the mortgagor. After these preferred creditors had been paid, the possession of the remaining property would revert to him; and at all times any of his creditors could have levied upon his interests in the mortgaged property, and sold it to pay such creditors' claim. To assert that a mortgagor who has created a mere lien on property (especially where, as in this case, the value of the property is largely in excess of the claims secured by the mortgage) has parted with all control over the property, is to ignore the character and legal effect of the instrument under which he has surrendered possession. Despite the mortgage, it is still his property. He may sell it. He may mortgage it. It may be seized for his debts. How such a transaction can be held to be an assignment for the benefit of creditors is inexplicable to us. An assignment for the benefit of creditors creates a trust, vesting the legal title in the assignee, and placing the property beyond the control of the assignor or the reach of any of his creditors, except as they have a right, under the assignment, to share in the distribution of the assigned estate. It is for this reason that assignments for the benefit of a portion of the assignor's creditors have been held void under the statute invalidating all transfers which delay creditors. In such a case the debtor would, if the transaction were valid, be able to place for a time his property beyond the reach of the creditors who have no rights under the assignment, because that portion of the assigned estate which would come back to him after the trust is executed would, during the existence of the trust, be withheld from the reach of such creditors. But a mortgage creates no trust. It creates a mere lien. It is in no respect assimilated to an assignment for the benefit of creditors, and yet, by the express terms of the statute, it is in only such an assignment that the

law condemns a preference. The common law recognized the right of a debtor to secure or pay one creditor in preference to all others. The general rule is embodied in our statute. Section 4654, Comp. Laws, declares that "a debtor may pay one creditor in preference to another or may give one creditor security for the payment of his demand in preference to another." Section 4660 takes a certain class of transactions out of this general rule. But we must not lose sight of the fact that preference is the rule in this jurisdiction, and that he who questions the right of a debtor to make a preference must lay his hand upon the law which takes away this right in a given case. The legislature has seen fit to draw the line at instruments which constitute assignments for the benefit of creditors. Such instruments must not contain preferences. If they do they are void, and the property becomes a trust fund for the equal benefit of all creditors. But this statute does not attempt to prevent the giving of security to one or any number of creditors in preference to others, and section 4654, in terms, allows this to be done. To hold that a chattel mortgage is an assignment for the benefit of creditors, that the creation of a mere lien is the creation of a trust, that retaining title to property is surrendering all control over it, displays an utter disregard of well settled legal distinctions. To extend the construction of the statute to embrace a transaction of the character disclosed by this record, under the specious pretext of following the spirit of the law, is downright usurpation of legislative functions. To us the fallacy of the reasoning in the case of Straw v. Jenks, and in the other cases in which the rule there enunciated is laid down, is in the assumption that preference is the exception, and not the rule, whereas the general rule permits preference, and he who claims that a preference is illegal must bring the case within the particular exception embodied in section 4660. The statute does not declare that one who has decided to apply all his property in payment of his debts, as far as it will apply, must distribute it among his creditors ratably. This he must do if he executes a general assignment. But the law does not compel him to make a general assignment, and it does permit him to pay or secure any creditor in preference to another. Of course, this statute allowing preferences relates to insolvent debtors. When a debtor is solvent there can arise no question of preference. It is only when he is insolvent that the right to prefer is of any value to him, or to the creditor preferred. An insolvent debtor may therefore pay one creditor in preference to others, although it takes every dollar of his property to make the payment. It is only when he executes an assignment for the benefit of all of his creditors that he cannot discriminate and favor. Then he must place all creditors on an equal footing. If he does not, the law and the courts will do it for him. The argument in Straw v. Jenks and similar cases is that the object of the law will be defeated if the rule there enunciated is not adopted. This reasoning assumes that the object of the statute is something other than it is therein expressed to be. The purpose of the law, if the language in which that purpose is couched is to be our guide, is that the general rule permitting preferences shall be abrogated in a single class of cases, *i. e.*, where a debtor executes such an assignment for the benefit of creditors as the act embraced in the title in which section 4660 is found refers to. An analysis of this act (sections 4660-4680, both inclusive) discloses a legislative intent therein to deal with assignments for the benefit of all the assignor's creditors. In such an instrument there shall be no preference. In every other transaction the debtor may prefer. The case of Straw v. Jenks has been overruled by the South Dakota Supreme Court in an opinion whose logic, to our mind, is unanswerable. Manufacturing Co. v. Max, 58 N. W. Rep. 14. Straw v. Jenks merely followed White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. Rep. 309. This case merely followed what the court regarded as the rule in Illinois, as laid down in Preston v. Spaulding, 120 Ill. 403, 10 N. E. Rep. 903. In a later case the Federal Supreme Court has ruled differently in a case arising in Missouri, following a different rule adopted in that State. Union Bank of Chicago v. Kansas City Bank, 136 U. S. 235, 10 Sup. Ct. Rep. 1013. In this case, Mr. Justice Gray expressly declares that all the court intended to do in White v. Cotzhausen was to construe the Illinois statute in accordance with what it understood to be the decision of the Supreme Court of that State. That the Federal Supreme Court, in White v. Cotghausen, did not corrrectly interpret the decision of the Illinois Supreme Court in Preston v. Spaulding, is evident from later decisions of that court. See Farwell v. Nilsson, 133 Ill. 45, 24 N. E. Rep. 74; Weber v. Mick (Ill. Sup.), 23 N. E. Rep. 646. And see Moore v. Meyer, 47 Fed. Rep. 99; Schrodder v. Walsh, 120 Ill. 403, 11 N. E. Rep. 76. There is nothing in Farwell v. Cohen (Ill. Sup.), 28 N. E. Rep. 35, opposed to the views expressed in Farwell v. Nilsson. In many of the cases there was in fact a general assignment for the benefit of creditors executed. When a debtor, with the purpose of executing such an assignment, makes transfers of property or gives security or pays money before executing the assignment, for the express purpose of evading the provisions against preferences,—when his purpose, known to the favored creditor, is to accomplish by independent instruments what could not be accomplished in the assignment itself,—and thus deliberately attempting to evade the law, thereafter executes an assignment for the benefit of creditors, it is impossible that the instruments giving the preferences should be regarded as part of the assignment, and that, therefore, the preference should be held to be contained in the assignment itself, and consequently of no effect. But in such cases the transactions ought not to be too far apart, and certainly the preferred creditors should be proven to have had knowledge of the debtor's purpose to make an assignment at the time of giving the preferences. See, in this connection, Manning v. Beck, 129 N. Y. 1, 29 N. E. Rep. 90; Banking Co. v. Fuller, 110 Pa. St. 156, 1 Atl. Rep. 731.

We hold that these chattel mortgages did not constitute a general assignment for the benefit of creditors, and that the debtor had a perfect right to execute them to the creditors therein named, to secure his obligations to them. It therefore followed that the mortgaged property was not a trust fund in which all the creditors of defendant Pollack had an interest, but was his property, on which there were mortgage liens held by such of the defendants as were named in the three mortgages as mortgagees. As sustaining our conclusions, we cite Manufacturing Co. v. Max (S. D.), 58 N. W. Rep. 14; Hargadine v. Henderson, 97 Mo. 375, 11 S. W. Rep. 218; Union Bank of Chicago v. Kansas City Bank, 136 U. S. 235, 10 Sup. Ct. Rep. 1013; May v. Tenny, 148 U. S. 60, 13 Sup. Ct. Rep. 491; Farwell v. Nilsson, 133 Ill. 45, 24 N. E. Rep. 74; Weber v. Mick (Ill. Sup.), 23 N. E. Rep. 646; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. Rep. 70; Tompkins v. Hunter (Sup.), 24 N. Y. Supp. 8; Cross v. Carstens (Ohio), 31 N. E. Rep. 506; Moore v. Meyer, 47 Fed. Rep. 99; Crow v. Beardsley, 68 Mo. 435; Gilbert v.

McCorkle (Ind. Sup.), 11 N. E. Rep. 296; Waterman v. Silberberg (Tex. Sup.), 2 S. W. Rep. 578; Warner v. Littlefield (Mich.), 50 N. W. Rep. 721; Sheldon v. Mann (Mich.), 48 N. W. Rep. 573. Other cases might be cited, but this question has been so often discussed, and the decisions so many times reviewed, that we feel that it would be a waste of time for us to travel again over the same ground. With the exception of Straw v. Jenks, White v. Cotzhausen, and a few other cases, all of the decisions which have struck down preferences have been in cases in which it appeared that an assignment for the benefit of creditors was in fact executed; and the courts in those cases held that the instruments creating the preferences were so connected in point of time, and by the circumstances of the transactions, with the subsequent general assignment, that they were a part of it, and that, therefore, the preferences were, in contemplation of law, embodied in the assignment itself. Such, among others, were the cases of Preston v. Spaulding, 120 Ill. 208, 10 N. E. Rep. 903; Berger v. Varrelmann, 127 N. Y. 281, 27 N. E. Rep. 1065; Clapp v. Nordmeyer, 25 Fed. Rep. 71; Burnham v. Haskins (Mich.), 44 N. W. Rep. 341.

CRIMINAL LIBEL—CHANGES IN THE RULES OF EVIDENCE AND BURDEN OF PROOF.

Blackstone says: "Every libel has a tendency to the breach of the peace by provoking the person libeled to break it, which offense is the same in point of law whether the matter be true or false; and, therefore, the defendant on an indictment for publishing a libel is not allowed to allege the truth of it by way of justification.[1] In addition to this the common law courts held there were but two questions for the jury: First. The fact of publication; and, second, the meaning of particular words in the innuendoes. The question of law or criminality that appeared upon the record was for the court.[2] In the case against the Dean of Asaph,[3] in which he was prosecuted for publishing what Campbell calls a harmless dialogue of Sir William Jones, Buller, J., instructed the jury that they were not entitled to form any opinion upon the character of the paper charged as libelous. Erskine, his counsel, moved for a new trial on the ground of misdirection, but Chief Justice Mansfield sustained the charge. He said: "They (the jury) do not know and are not presumed to know the law. They do not understand the language in which it is conceived or the meaning of the terms. They have no rule to go by except their affections and wishes. It is said that if a man gives a right sentence upon hearing one side only he is a wicked judge, because he is right by chance only, and has neglected taking the proper method to be informed. So the jury who usurp the judicature of law, though they may happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the judge to tell the jury how to do right though they have it in their power to do wrong, which is a matter entirely between God and their own consciences. To be free is to live under a government by law. The

[1] 3 Black. Com. 125.

[2] Campbell's Lives Chief Justices, Vol. 3, 432. In People v. Crosswell, Appendix to 3d Johns. Cas. 363, on the trial of the defendant for a criminal libel the chief justice instructed the jury as follows: "That it was not their province to inquire or decide on the intent of the defendant or whether the publication was libelous or not. That those were questions of law to be decided exclusively by the court upon the return of the *postea*; and that the only points for their consideration were: First, whether the defendant published the paper stated in the indictment; and, secondly, whether the innuendoes were true, and that if they were satisfied of these two points it was their duty to find the defendant guilty. The second ground of error was that he denied to the defendant the opportunity of producing testimony to prove the truth of the libel on the ground that the defendant could not be permitted to give in evidence to the jury the truth of the charges contained in the libel." A motion for a new trial was made by Alexander Hamilton upon the ground of misdirection of the jury, and exclusion of testimony. The court was equally divided upon the question. Kent and Thompson, being in favor of a new trial, and Lewis, before whom the cause was tried, and Livingston being opposed to it. This led to the enactment by the legislature of New York, in 1805, of the following provision: "Whereas, doubt exists whether on the trial of the indictment or information for a libel the jury have the right to give their verdict on the whole matter in issue, be it therefore enacted, etc. that on every such indictment or informrtion the jury who shall try the same shall have a right to determine the law and the fact, under the direction of the court in like manner as in other criminal cases, and shall not be directed or required by the court or judge before whom such indictment or information shall be tried to find the defendant guilty merely on proof of the publication by the defendant of the matter charged to be libelous and of the sense ascribed thereto in such indictment or information: provided, nevertheless, that nothing herein contained shall be held or taken to impair the right and privilege of the defendant to apply to the court to have the judgment arrested as hath heretofore been practiced; (2) that in every prosecution for writing or publishing any libel it shall be lawful for the defendant upon the trial of the cause to give in evidence in his defense the truth of the matter contained in the publication charged as libelous; provided always, that such evidence shall not be a justification unless on the trial it shall be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends."

[3] 3 Term. Rep. 428.

licentiousness of the press is Pandora's box, the source of every evil. Miserable is the condition of individuals, dangerous is the condition of the State if there is no certain law; or, which is the same thing, no certain administration of the law, by which individuals may be protected and the State made secure. Jealousy of leaving the law to the court as in other cases, so in the case of libels is now in present state of things puerile, rant and declamation." Campbell, in commenting upon the statement of Chief Justice Mansfield, says, in substance, the practice could not be carried back further than the time of Lord Raymond, and that the law instead of being acquiesced in was contested in every State prosecution for libel.[4] This trial took place in 1784. The law as construed was designed to abridge freedom of the press and of speech, and in effect made it a crime to expose the misdoings of public officials or others. Campbell, in speaking of this attempt to put writers in a strait jacket, says:[5] "Lord Somers and the leaders of the revolution of 1688 would not venture for some years to allow printing without a previous license, and that in the opinion of many of the most enlightened men in the next generation, a licenser could only be dispensed with upon the condition that the sentence upon writings after they were published should be pronounced by the permanent functionaries whom the crown should select for having a sufficient horror of everything approaching a sedition. It was not until after a struggle of half a century, and under a minister then highly liberal (although he afterwards tried to hang a few of his brother reformers who continued steady in the cause), that the bill passed declaring that on a trial for libel the jury in giving their verdict should have a right to take into consideration the character and tendency of the paper alleged to be libelous. Still the truth of the facts stated in the publication complained of could not be inquired into; for half a century longer the maxim prevailed: 'the greater the truth the greater the libel,' and it was only in the year 1845 that 'Lord Campbell's Libel Bill' passed permitting the truth to be given in evidence, and referring it to the jury to decide whether the defendant was actuated by malice or by a desire for the good of the community. These successive alterations of the law are now admitted to have operated beneficially, not only being favorable to free discussion, but really tending to restrain the licentiousness of the press." It will thus be seen that the common law from the time of the English revolution was that the truth of a charge was not a defense—an infamous doctrine, to make the writing of the truth a crime. This statement is necessary in order to understand the decisions under the common law and the changes made by the constitutions and statutes of the several States. The oppressive character of these decisions, their incompatability with free government, was felt by friends of free government wherever the common law prevailed, and led to the adoption of the first amendment of the constitution of the United States, which prohibits the enactment of any law "abridging the freedom of speech or the press." Sec. 8, art. 7 of the constitution of 1846 of New York, provides: "In all prosecutions on indictments for libels the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends the party shall be acquitted and the jury shall have the right to determine the law and the fact. Sec. 11, art. 1, of the constitution of Ohio, declares: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends the party shall be acquitted." Provisions of this kind are found in either the constitutions or statutes of nearly all of the States. In Nebraska the provision is: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives and for justifiable ends shall be a sufficient defense. Sec. 11 of the bill of rights of the constitution of Kansas is as follows: "The liberty of the press shall be inviolate, and all persons may

[4] Campbell's Lives of Chief Justices, Vol. 3, p. 433.
[5] Lives Chief Justices, Vol. 3, pp. 434-435.

freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends the accused party shall be acquitted." Sec. 272 of the Kansas Criminal Code provides: "In all prosecutions or indictments for libel the truth thereof may be given in evidence to the jury; and if it appears to them that the matter charged is libelous was true and was published with good motives and for justifiable ends, the defendant shall be acquitted." Sec. 275: "In all indictments or prosecutions for libel the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact. That portion of section 272, above quoted, requiring the defendant, in order to make a good defense of justification, to prove that the alleged libelous matter was published with good motives, has been held to be in violation of the constitution and void.[6]

There is no doubt the decision of the Kansas Supreme Court is right. In a late case in Indiana,[7] it was held that if the words were true it was a complete defense, whether the publication was made in good faith or not. Sec. 5, art. 1, of the constitution of New Jersey, is as follows: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact." In a late case the Supreme Court of that State made an elaborate examination of the New York and English authorities between the years 1790 and 1805, and the changes effected in England and New York by statute during those years. It is said in speaking of the New York statute of 1805: "The purpose of the provision was to declare and secure the right of the jury to decide for themselves, with proper regard to the views of the court, whether the meaning and tendency of the publication were such as to bring it within the legal definition of a libel, whether it was privileged under the rules of the common law and whether it was true and published with motives which to them appeared good and for ends which to them appeared justifiable; in short, the right of the jury to give a general verdict on the whole matter put in issue (if we adopt the English phrase), or to determine the law and the fact (if we employ the equally broad and more explicit American substitute). The provision also enjoined upon the court the duty of admitting evidence tending to show the truth of the publication and the motives and ends of the publisher, and entitled the defendant to an acquittal on his meeting its requirements is these particulars."[8]

The same doctrine as recently declared by the Supreme Court of Kansas[9] It must be borne in mind that the present statutes and constitutional provisions date back but little more than fifty years; that the criminal law is but rarely resorted to, almost all the actions being to recover damages, hence there are but comparatively few criminal cases reported and writers on the subject give it a trifling notice. In charging the offense in the information or indictment the pleader should allege that the defendant "unlawfully and maliciously" did write and publish a certain false, malicious and defamatory libel of and concerning E. F., etc. (setting out the libelous matter). Under the plea of not guilty it will devolve on the State in the first instance to prove the material allegations of the charge, viz: That it is false and malicious. No doubt in many cases malice will appear from the proof of the false charge, but if it does not the State must introduce proof tending to sustain it. In a civil action where the charge is actionable *per se*, the law will presume the good character of the person who claims to be libeled, and he need not in the first instance produce proof to sustain his character. In a criminal prosecution, however, another element enters into the case, viz: the presumption of innocence

[6] State v. Verry, 36 Kas. 416, 13 Pac. R. 838; State v. Wait, 44 *Id.* 314, 24 Pac. R. 354.

[7] State v. Bush, 122 Ind. 42, 23 N. E. Rep. 677.

[8] Drake v. State, 20 Atl. Rep. 747.

[9] Appeal of Lowe, 26 Pac. Rep. 749.

in favor of the party making the charge and the presumption of innocence continues as evidence in favor of the accused until he is proven guilty.[10] The presumption of innocence, therefore, is an offset to the presumption of good character, and unless there is proof of the falsity of the charge the case must fail. The accused may rebut the proof that the charge is false by showing that it is true, and even if he fail in that he may prove any fact that tends to show a want of malice. In the older cases it was held that the defendant must prove the truth of the charge beyond a reasonable doubt, but in the late cases it is held that if, from all the evidence before the jury, a reasonable doubt arises in their minds of the truth of the publication, the defendants are entitled to the benefit of that doubt. In other words, a case of criminal libel is to be tried like any other criminal accusation, and the accused is entitled to the same presumptions as in ther cases,[11] and to authorize a conviction the jury must be satisfied beyond a reasonable doubt that the accusation is false and malicious.[12] SAMUEL MAXWELL.

[10] 1 Greenl. Ev., 34; Wharton Ev., 1440. In People v. De Fore, 64 Mich. 693, 31 N. W. Rep. 589, 590, it is said: "It is the duty of a trial judge in a criminal case to instruct the jury in reference to the presumptions of law applicable to the case before them, distinguishing those which are conclusive from those which are disputable. The presumption of innocence is present in every criminal case; and he should instruct the jury to that effect and that it stands good until overcome by evidence which convinces the jury beyond a reasonable doubt that the respondent is guilty." The same rule is declared in State v. Johnson, 91 Mo., 3 S. W. Rep. 869; Garrison v. People, 6 Neb. 275, and is elementary.

[11] State v. Bush, 122 Ind. 42, 23 N. E. Rep. 677. Berkshire, J., says: "The appellees were not required to prove the truth of the publication to entitle them to an acquittal. If from all the evidence before the jury a reasonable doubt arose in the minds of the jury as to the truth of the publication, the appellees were entitled to the benefit of that doubt and therefore a verdict of not guilty. Gillett, Crim. Law, 683; Polk v. State, 19 Ind. 170; Bradley v. State, 31 Ind. 492; Snyder v. State, 89 Ind. 105; McDougal v. State, 88 Ind. 24. This is a long and well established rule in Indiana applicable to all criminal prosecutions." Drake v. State, 20 Atl. Rep. 747; State v. Wait, 44 Kas. 310, 24 Pac. Rep. 354.

[12] Beall v. State, 13 South. Rep. 783; State v. Bush 122 Ind. 42, 23 N. E. Rep. 677; State v. Wait, 44 Kas. 310, 24 Pac. Rep. 356.

NUISANCE—FILTHY PERCOLATIONS.

BEATRICE GAS COMPANY V. THOMAS.

Supreme Court of Nebraska, June 27, 1894.

1. One who collects injurious or offensive matter upon his premises, which, by percolation, transmission through subterranean streams, or otherwise, pollutes his neighbor's well, is liable for the damages thereby sustained.

2. It is not necessary for the recovery of such damages that the fact of the contamination of plaintiff's well was known by the defendant. It is sufficient that such contamination was the natural and probable consequence of defendant's acts.

3. Where an injury of such character causes permanent and irremediable damage to plaintiff's land, the plaintiff should recover in one action all damages, present or prospective. But if the injury was temporary in its character, and capable of being avoided in the future without permanent injury to plaintiff's land, damages can only be recovered up to the commencement of the action, the injury then being in the nature of a continuing nuisance.

4. The fact that the injury could be avoided by digging a new well would not be a bar to the action, but would be admissible in mitigation of damages, by restricting the plaintiff to such recovery as would compensate him for reasonable expenses incurred in avoiding the injury.

5. The plaintiff having introduced evidence that other wells in the neighborhood of the source of pollution complained of were likewise affected, held, that evidence on behalf of the defendant to show that other wells, situated at a great distance from such source, were also likewise affected, was admissible.

IRVINE, C.: Thomas brought this action against the gas company, alleging that the plaintiff was the owner of a certain lot in South Beatrice, and had been such owner for five years, occupying the premises as a homestead; that he dug a well thereon suitable for use; that the gas company operated and maintained its manufactory one block from the property of the plaintiff; that contiguous to this factory the gas company made a large excavation in the ground, reaching into the sand, into which it emptied all the filth and waste coming from its factory, consisting of a deadly and poisonous liquid, which was absorbed into the sand, and by said cesspool carried and percolated itself from the cesspool, through the ground, to the plaintiff's well, rendering the water therein unfit for use, dangerous, and unwholesome; that by reason of the premises the plaintiff had lost his well, his land had been rendered unfit to make another well, and he had been compelled to carry water necessary for household use and for stock for a long distance; that he had expended large sums of money in efforts to remedy the evil; that the value of his property had been destroyed,—all to his damage in the sum of $900. The answer amounted to a general denial. There was a trial to a jury, and a verdict and judgment for the plaintiff for

$453.78, from which the gas company prosecutes error.

The evidence on the trial tended to show that the gas company sank what it calls a "condense well" on its own property, at a distance of 492 feet from plaintiff's well; that into this condense well the company permitted to flow certain waste products; that some months after this condense well went into use, it was discovered that plaintiff's well was contaminated. Some time afterwards the water became wholly unfit for use. There seems here to be a stratum of sand between beds of rock and clay. The condense well reached the sand. Plaintiff's well passed through the sand and into the rock. The odor of the water in plaintiff's well after its contamination was similar to the odor in the neighborhood of the condense well. The odor resembled that of naphtha, and there was evidence tending to show that the gas company used naphtha in its process. During the trial, evidence was introduced tending to show that other wells in the neighborhood of plaintiff had been contaminated in like manner. The admissibility of this evidence, under ordinary circumstances, would be at least doubtful; but, under the circumstances of this case, we think the action of the trial judge was correct. The evidence first came in connection with proof that the plaintiff was compelled to carry all the water for his household use from a great distance, and he accounted for this fact by proving that a nearer well was polluted in the same manner as his own. Moreover, there were suggestions, in the course of the examination of witnesses, that plaintiff's well had been polluted by the voluntary act of himself or some other person. After this evidence was in, and near the close of the defendant's case, an effort was made by the gas company to show that a well had been sunk on the opposite side of the river, and that the water obtained in that well was contaminated in the same manner. This evidence was excluded. The record does not show how far this well was from the gas works, but it does appear it was in another portion of the city. We think the court should have admitted this evidence. The fact that other wells, at a considerable distance, were likewise polluted, would not conclusively show that the pollution of plaintiff's well was not due to the gas company, but it would tend in that direction; and the greater the distance the stronger the inference would be that the cause in both cases was a general cause, affecting the whole region, and not the act of the gas company, complained of. We are aware that the introduction of such testimony leads to the danger of introducing collateral issues into the trial. At the same time, we think that such evidence was material, and, within reasonable limits, should have been admitted, especially as the plaintiff had introduced proof of the contamination of neighboring wells. For this error the judgment must be reversed, but, as a new trial must be had, it is proper that we should consider the fundamental questions raised by the record.

The gas company contends that there could be no liability for an injury of the character complained of. This question is raised by the assignment that the petition does not state a cause of action, and by exceptions to the instructions, which were to the effect that if matter in the condense well percolated through the ground into plaintiff's well, polluting the water, then the condense well was a nuisance, for the maintenance of which the plaintiff was entitled to damages. The law on the subject, as stated in the adjudicated cases, is not in a condition very satisfying to the reason. The cases are so numerous that a complete review would be unprofitable and almost impossible. We shall select certain cases, which are probably those most frequently cited, and those which have served as landmarks for the discussion.

In a number of cases, of which Acton v. Blundell, 12 Mees. & W. 324, is representative, it has been held that the law in relation to surface water-courses is not applicable to subterranean streams, and that a proprietor has no cause of action because of the fact that another, by sinking a well or by the proper opening of a mine, taps a subterranean water-course, and deprives such proprietor of the water supply for his own well. This doctrine is put chiefly upon the ground that the existence, course, and extent of a subterranean water-course must be largely unknown; a reason not altogether satisfactory. In such cases the maxim is applied that the proprietor of land owns from the center of the earth to the heavens. The applicability of this maxim is doubtful, for the reason that it would seem to apply as well to a stream on the surface as to a subterranean stream. Still, we think the doctrine must be accepted, because of its firm establishment, and upon the principle that each proprietor is entitled to the use of such streams while on his premises, although the effect of that use may be to diminish his neighbor's use thereof. Together with these cases came a series represented by Womersley v. Church, 17 Law (N. S.) 190, wherein it was held that a man has no right to place offensive matter upon his land, where percolation through the soil takes place, contaminating his neighbor's well, and that for such acts an action may be maintained. In Ball v. Nye, 99 Mass. 582, this doctrine was followed, where a vault had been constructed, from which percolation took place, through the soil, to the injury of another's well and cellar. Following these cases came a series best represented by Brown v. Illius, 27 Conn. 84, and Ballard v. Tomlinson, 26 Ch. Div. 194, wherein it was attempted to reconcile the two classes of cases we have referred to by drawing a distinction between a percolation through the soil and a contamination produced by means of a subterranean water-course; it being said that, if a man had no right of action because his supply of water was cut off by tapping the subterranean stream, he could have no right of action because it was polluted through such subterranean

stream. This was, we think, a *non sequitur*. While a man may use water from a stream, to the diminution of his neighbor's supply, it does not follow that he may pollute the water and pass it on to him in this polluted state. So, in the case of subterranean streams, I have, as much as my neighbor, the right to tap them and use them while they are on my premises, and he cannot complain of that use; but it does not follow that I may contaminate them on my premises, and permit the pollution to pass upon my neighbor's. The fallacy referred to drove the courts to the distinction pointed out. The effect of such distinction would give the plaintiff here a right of action, provided he could prove that the offensive matter percolated through the soil to his well without the aid of a subterranean water-course, but would deprive him of his action in case such water-course was a conductor of the offensive matter. It is rather strange that so absurd a distinction should have obtained such strong support in the authorities. It has even received the approval of Judge Cooley in Upjohn v. Board of Health, 46 Mich. 542, 9 N. W. Rep. 845; but that case is not authority in support of the doctrine, for the reason that Judge Cooley's remarks in that case are clearly obiter, and the case was decided upon other grounds. The fallacy of these cases has recently been recognized by the courts, and the more recent decisions tend strongly to overthrow this doctrine, which seemed in danger of becoming fixed in our law by repeated decisions. Collins v. Gas Co., 139 Pa. St. 111, 21 Atl. Rep. 147, was a case where the gas company, in digging a well for natural gas, tapped a fresh-water water-course, and also a salt-water stream. By negligence in its manner of drilling its well, the salt water was commingled with the fresh water, injuring a spring of plaintiff. It was held that the defendant was liable because of this unnecessary injury of plaintiff's property. In Gas Co. v. Pebley, 25 Fla. 381, 5 South. Rep. 593, Ballard v. Tomlinson, 26 Ch. Div. 194, was distinguished upon the theory that in Ballard v. Tomlinson the pollution had been caused by the plaintiff himself, in pumping his own well so as to draw water from the other. In drawing this distinction the court went perhaps too far to sustain the English case; but we think the conclusion reached was in accordance with sound principle, to-wit, that it was the duty of the gas company to confine the refuse from its works so that it could not enter upon and injure its neighbors, and if it failed to do so it was at its peril.

The most satisfactory exposition of the subject which has come to our notice is found in the case of Kinnaird v. Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, where, after a review of some of the cases already referred to, the court says: "It seems to us, after a careful review of the authorities referred to by counsel for the corporation,—all of which are entitled to great weight,—that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation, or is found in hidden viens, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor. It is a familiar doctrine that one must so use his property as not to injure his neighbor; and because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it so that when it reaches his neighbor's land it is in such condition as to be unfit for use either by man or beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both; and, while he can thus appropriate it, he has no right so pollute the water in such a manner, that when it passes to his neighbor, it becomes more dangerous or unhealthy to his family or to the beasts on his farm. As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it; and, if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground,—he is entitled to the use of what is above the ground as well as that below it,—and still it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor to the injury of the health of himself or family. If not, we see no reason why he should be permitted to contaminate the water that flows from his land to his neighbor's, producing the same results, and still escape liability for the damages sustained, and whether the water escapes the one way or the other is immaterial."

Our conclusion is, therefore, that the distinction made in the earlier cases is not well founded, and that one who collects injurious or offensive matter upon his premises, which, by percolation, transmission through subterranean streams, or otherwise, pollutes his neighbor's well, is liable for the damages sustained.

The defendant contends that no action will lie for any damages sustained prior, at least, to the time when defendant had notice of the injury. We can see no force in this contention. It is true that some of the cases base the right to recover upon defendant's knowledge that he was committing the injury; but the injury was as great before as after notice. An action in tort is not a proceeding to punish a defendant for a willful act, but to compensate the plaintiff for the invasion of his rights. It was not necessary, in order to constitute the pollution of the well a tort, that it should be done willfully. The most that can be said is that the defendant would not be liable for damages unless the injury was one which was the natural and probable consequence

of those acts. While the defendant may not have known, and probably did not know, that its condense well would pollute the plaintiff's well, it was bound to know that the natural and probable consequence of collecting waste matter in its condense well would be the injury of some wells which might be connected with the condense well by the stratum of sand referred to.

Complaint is also made of the court's instruction in regard to the measure of damages, for the reason that it allowed the jury to take into consideration all damages sustained to the time of trial. It was held in Railroad Co. v. Standen, 22 Neb. 343, 35 N. W. Rep. 183, that a bridge negligently constructed so as to make an unlawful obstruction to the Platte river, injuring land above the bridge, was a continuing nuisance, for which damages could only be recovered to the the time that action was brought. We presume this was upon the theory that there was no permanent injury to the land, and that the damages only existed while the bridge was maintained in the manner complained of. The general policy of the law is to avoid multiplicity of actions, and, if practicable without injustice, to afford compensation in one action for all injuries. We think the true rule is stated correctly in Wood on Nuisances (section 869), as follows: "When the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action. Thus, in an action for overflowing the plaintiff's land by a mill-dam, the land being submerged thereby to such an extent and for such a period as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land. So, too, when a railroad company, by permanent erections, imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once; but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may, but must, be brought to recover the damages sustained." There was, in the case under consideration, evidence that the value of plaintiff's property had been diminished by the contamination of the well. The inquiry, we think, should have been as to whether or not the defendant's acts had caused a permanent and irremediable injury to plaintiff's property. If so, the plaintiff was entitled to compensation in this action for all such injury, present or prospective. If, on the other hand, the injury was temporary in its character, and capable of being avoided in the future without permanent injury to plaintiff's freehold, the case was one of a continuing nuisance, and damages should have been restricted to the commencement of the action.

There is some discussion in the briefs of the law of avoidable consequences, as applied to the case. The court properly refused to instruct the jury that there could be no recovery because plaintiff had not endeavored to procure a good well upon his premises. His failure to do so would not be a defense to the action, but would go in mitigation of damages, provided the jury should find that by making another well the injury could be avoided; and it is for the same reason that the plaintiff would be entitled to recover any reasonable expenses he might have incurred in an effort to purify the old well or obtain a new one. For the errors referred to, the judgment must be reversed, and the cause remanded. Reversed and remanded.

NOTE.—The distinction, referred to in the principal case, between filthy percolations which pass through the soil itself, and those which are borne upon a subterranean water-course, although clearly open to the criticisms contained in the above opinion, has been recognized and acted upon in many cases. As to the first, that is, the percolations of filthy matter, through the soil, to the premises of the adjacent owner, to his injury, there can be no doubt that it is an actionable nuisance, for which the party who permits it is liable. Tenant v. Goldwin, 1 Salk. 360; Wonnersly v. Church, 17 L. Times (N. S.), 190; Norton v. Scholefield, 9 M. & W. 663; Tate v. Perrish, 7 T. B. Mon. 325; Columbus Gas Co. v. Freeland, 12 Ohio St. 392; Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Greene v. Nunnemacher, 36 Wis. 50; Dillon v. Acme Oil Co., 2 N. Y. Supp. 289, 49 Hun, 565; Bloodgood v. Ayres, 108 N. Y. 400, 2 Am. St. Rep. 443; Upjohn v. Board of Health, 46 Mich. 542; Ottawa Gas Light Co. v. Graham, 28 Ill. 73; Delhi v. Youmans, 45 N. Y. 363, 6 Am. Rep. 100; Ballard v. Tomlinson, L. R. 29 Ch. Div. 115. In such a case the liability does not depend upon negligence at all. The party accumulating or having control of the filthy matter has the obligation, imposed upon him by law, to effectually exclude it from his neighbor's land. Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Hodgkinson v. Ermor, 4 B. & S. 229; Columbus Gaslight Co. v. Freeland, 12 Ohio St. 392, 400. See, also, the recent case of Hauck v. Pipe Line Co., 153 Pa. St. 366.

But when the offensive percolations reach the land of the adjoining proprietor, by means of a subterranean channel, some of the courts invoking the rule that rights in subterranean waters cannot ordinarily be defined and preserved, have held that for such injuries there is no liability. Without doubt the rule of law has become well established that owners of the soil have no rights in subsurface waters, not running in well defined channels, as against their neighbors who may withdraw them by wells or other excavations. Acton v. Blundell, 12 M. & W. 324; Greenleaf v. Francis, 18 Pick. 117; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Chatfield v. Wilson, 28 Vt. 49; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Frazier v. Brown, 12 Ohio St. 294; New Albany, etc. R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60. If, it is argued, there is no right of action for destroying a well by withdrawing the water from it by an excavation on adjoining lands, how can there be an action for destroying it by pollution; the injury is the same in kind and degree. Dillon v. Acme Oil Co., 2 N. Y.

Supp. 289, 49 Hun, 565; Blooodgood v. Ayres, 108 N. Y. 400, 2 Am. St. Rep. 443; Upjohn v. Board of Health, 46 Mich. 532; Columbus Gaslight Co. v. Freeland, 12 Ohio St. 392.

As to the remedy, the rule is that actual damage is not necessary to sustain the action for the pollution of waters. Holsman v. Boiling Spg. Co., 14 N. J. Eq. 335; Stockport Water-works Co. v. Potter, 7 H. & N. 160; Wheatley v. Chrisman, 24 Pa. St. 298; Merrifield v. Lombard, 13 Allen, 16. When the violation of the right is continuous so as to operate as a constantly recurring grievance and when an injunction will tend to restore the plaintiff to his former position, an injunction will be granted to restrain the nuisance even though no actual damage ensues. Wilts v. Swindon Water-works, L. R. 9 Ch. App. 451; Goodson v. Richardson, L. R. 9 Ch. App. 224.

CORRESPONDENCE.

RIGHTS OF BONA FIDE TRANSFEREE OF NEGOTIABLE PAPER BEFORE MATURITY.

To the Editor of the Central Law Journal:

On page 312 of the JOURNAL of October 12, 1894, paragraph 89, a reference is made to the case of Merchants' & Planters' Bank v. Millsap, Miss., 15 South. Rep. 659, which seems to establish a novel doctrine in this country. It seems there to be held, under the Mississippi code, that the *bona fide* transferee of a negotiable instrument, for value before maturity, takes it subject to all the equities existing between the original parties. If this is the law of the code of that State, does it render nugatory, in that jurisdiction, the numerous decisions of the Supreme Court of the United States, establishing a diametrically contrary doctrine under the common law rule of the law merchant? And further, if a negotiable note is executed and delivered in another State, and passes into the hands of an innocent indorsee for value before maturity, although it was without a valid consideration between the original parties, and suit is brought thereon in Mississippi, against the maker, who is a resident of that State when suit is brought, can he—the maker—take shelter under the code? In other words, would the code operate on the remedy, and defeat a recovery, regardless of the place where the contract was made and the note executed and negotiated?

J. T. MAFFETT.

BOOK REVIEWS.

PRENTICE ON POLICE POWERS.

As the author of this volume says, police powers arising under the law of overruling necessity are no new topic in any practical administration of sovereign authority. Special instances appear on many sides and within the last few years they have had an extraordinary growth in frequency and number, they have been set out in many new laws, illustrated by numerous decisions and have become increasingly difficult to group and to follow except as we have the aid of some connected study of them and inquiry though the adjudications which distinguish their sources, connections and principles and afford rules for guidance and observation. Such is the object proposed in this work. It treats in successive chapters of the origin and development of police powers, of administration general and local, mandatory and restraining laws, health and quarantine laws, offensive trades and nuisances, building laws, the limitation of police powers, licenses, taxes and regulations and recent State police legislation. The text is well written and contains many interesting discussions of principle. The citation of authorities is exhaustive. It is a volume of five hundred pages. Published by Banks & Brother, New York.

DILLON ON THE LAWS OF ENGLAND AND AMERICA.

Through an oversight we have heretofore failed to make special mention of this exceedingly interesting volume, which came to us from its publishers, Little, Brown & Co., some time ago. Meantime, however, we have given it thorough examination which has afforded us much pleasure and we have no doubt profit. The contents consist of a series of lectures delivered before Yale University by Judge John F. Dillon. The author says they are "just what they are and just what they purport to be and nothing more—namely, discourses to a class of law students, given largely to inspire a patriotic and just regard for the laws and institutions of our own country, to incite euthusiasm in the study of the law rather than to impart technical instruction, to awaken inquiry rather than to satisfy it upon subjects of vital moment to the profession lying somewhat outside of the ordinary legal curriculum." It is needless to say that the lectures are able, philosophical and vigorous, and are well worth study by practitioners as well as law students for whom they were intended.

AMER. RAILROAD AND CORPORATION REPORTS, VOL. 8.

There are a considerable number of very important railroad and corporation cases reported in this volume. Appended to a number of them are valuable notes by the editor, grouping the authorities on the subjects of the cases. Dooly Block v. Salt Lake Rapid Transit Co. (Utah), has a note on subject of electric railways in streets and rights of abutting owners. The case of Legendre v. New Orleans Brewing Association (La.), has an exhaustive note on subject of right of stockholder to inspect the books and records of the corporation. So also Union Pacific Railway v. Goodridge (U. S. S. C.), on subject of discrimination by railroads as common carriers. People v. Sheldon (N. Y.), has an interesting and useful note on trust trade and labor combinations; Alair v. Northern Pac. Rail road Co. (Minn.), on subject of limitation of liability to a specified amount by carriers. The series of which this volume is the latest, is of especial value to corporation and railroad attorneys, containing as it does, a collection of the current decisions of courts of last resort pertaining to the law of railroads and private and municipal corporations. Published by E. B. Meyers & Co., Chicago.

BROWNE'S KENT'S COMMENTARIES.

It is needless to say anything in behalf of Kent's Commentaries. They are too well known to the profession in this country at least, where they are regarded in much the same light as those of Blackstone. The editor of this edition "impressed with the belief that the presence of copious notes to these commentaries confuse the student and general reader and tend to divert and lessen their interest in the subject" has almost entirely refrained from annotations and has confined his table of cases to the decisions of American tribunals as cited by Chancellor Kent himself. In other words, the present editor has condensed in one

volume all the material as originally prepared by Chancellor Kent and omitted the aggregated notes of previous editions. Published by West Publishing Co., St. Paul.

HUMORS OF THE LAW.

A witness, in describing an event, said: "The person I saw at the head of the stairs was a man with one eye named Wilkins." "What was the name of the other eye?" spitefully asked the opposing counsel. The witness was disgusted with the levity of the audience.—*Ohio Legal News.*

Defendant was on trial for an assault committed by him on his mother-in-law. The prosecuting attorney announced that his evidence was closed. "Why," said the judge to him, "you haven't called the mother-in-law." "We expect to produce her, your honor," interposed counsel for the defense, "as a mitigating circumstance."

Some years ago a farmer sued an orphan asylum at Buffalo for injury to his sheep by a dog kept at the asylum. The case was tried in the county court, and the judge held as follows: "I have carefully looked over defendant's charter, and I find that it is not authorized to keep anything but orphans. Keeping a dog was therefore *ultra vires*, and it is not liable in this action."—*Green Bay.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY—Salvage Compensation. — A salvage undertaking is a speculative venture in which there is no reward if nothing is saved to the owner; and hence, if a claimant appears, the salvors are not entitled to the entire proceeds, even if they have necessarily incurred expenses exceeding the same.—THE FELIX, U. S. D. C. (Penn.), 62 Fed. Rep. 620.

2. ACCOUNT STATED—Impeachment.— Where the existence of a stated account is denied by defendant, and the only evidence of the same is the testimony of plaintiff and that of a friendly witness, evidence of the falsity of the items in the account, and the circumstances of the transaction, are admissible to show that there never was such an account.—COFFEE V. WILLIAMS, Cal., 37 Pac. Rep. 505.

3. APPEALABLE JUDGMENT—Decree—Dower.—Where a widow prayed that dower be assigned, that an account of rents and profits and of the improvements be taken, and for general relief, and the court decreed that she was entitled to the relief prayed, and ordered a reference, such decree was "final," within the meaning of Code, § 3611.—EX PARTE ELYTON LAND CO., Ala., 15 South. Rep 939.

4. APPEALABLE ORDERS—Petition for Removal.—The dismissal of a petition for removal on the ground of local prejudice stands on the same ground as an order of remand, and is not a final judgment from which a writ of error will lie.—PATTEN V. CHILLEY, U. S. C. C. (N. H.), 62 Fed. Rep. 497.

5. APPEAL—Motion for New Trial.—Rev. St. 1889, § 2243, requiring all motions in arrest of judgment and for a new trial to be filed within four days after judgment, is mandatory; and, when appellant's own abstract shows on its face that the motions were filed too late, the court will of itself take notice of that fact, and affirm the judgment.—CORNWELL V. WULFF, Mo., 27 S. W. Rep. 659.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A general assignment giving preference to creditors can only be attacked by a creditor who has not assented thereto.—SAMPSON V. JACKSON, Ala., 15 South. Rep. 893.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Creditors.— Where a firm assigns, and a creditor has a judgment against the partnership, and also a separate judgment against the individual partners for the same debt, he is entitled to a dividend on each judgment out of its respective estate.—IN RE JAMISON & CO.'S ESTATE, Penn., 29 Atl. Rep. 1001.

8. ATTACHMENT—Action by Sheriff on Note—Defenses. —In an action by a sheriff on a note seized under attachment, the note is subject to all the defenses which could be set up in an action by the defendant in the attachment suit.—NICHOLS V. HILL, S. Car., 19 S. E. Rep. 1017.

9. ATTACHMENT—Notice of Motion. — Under Comp. Laws, 1888, § 3326, relating to attachments, and providing that defendant may apply for a discharge of the writ on the ground that the same was improperly issued, the notice of such motion must specify the grounds of the motion.—CUPIT V. PARK CITY BANK, Utah, 37 Pac. Rep. 564.

10. BANKS AND BANKING—Collections—Trust in Proceeds.—A draft indorsed to a bank for collection, with directions to remit New York exchange, was paid by an overdraft on such bank, made by the drawee, and the draft was canceled. The bank sent its check for the proceeds, but, before it was paid, assigned for the benefit of creditors. Thereafter the overdraft was paid to the assignee: Held, that no trust existed in favor of the payee of the draft.—AKIN V. JONES, Tenn., 27 S. W. Rep. 669.

11. BUILDING ASSOCIATION—Non-borrowing Member —Withdrawal.—A non-borrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, cannot bring an action and take judgment against the association when, under the statute (Gen. Laws 1891, ch. 131, § 27), as well as in the by-laws of the association, there is no money in the treasury legally applicable to the payment of his claim.—HEINBOKEL V. NATIONAL SAV., LOAN & BLDG. ASS'N., Minn., 59 N. W. Rep. 1050.

12. CARRIERS OF GOODS — Negligence— Delivery of Goods.—The mere delivery of warehouse receipts, with order for delivery of the goods, to a common carrier, is not a constructive delivery of the goods, so as to render it liable in case the goods are burned in the warehouse before it can remove the same, though it entered the receipts on its books, and had commenced to remove the goods. — STEWART v. GRACY, Tenn., 27 S. W. Rep. 664.

13. CARRIERS OF PASSENGERS—Contract of Carriage. —The mere taking of steerage passengers from an infected port, on a regular passenger steamship accustomed to carry steerage, is no breach of the ship's contract of carriage with a cabin passenger, or a breach of any duty that the ship owes to him.—THE NORMANNIA, U. S. D. C. (N. Y.), 62 Fed. Rep. 469.

14. CHATTEL MORTGAGE—Factor's Contract.—An instrument purporting, in consideration of advances, to convey certain personalty described, and agreeing to ship the grantee all naval stores and cotton produced and bought by the grantor in the past and two following years, to be sold on regular factor's charges, conveys no title to such naval stores.—WILKINS v. LEE, S. Car., 19 S. E. Rep. 1016.

15. CHATTEL MORTGAGES—Fraudulent Conveyance.— A mortgagee of personal property held as indemnity may with the mortgagor's consent, take possession of such property, and sell it under foreclosure, where such transaction is carried out in good faith, and it will be valid and binding on the mortgagor's creditors.—PARK v. PARSONS, Utah, 37 Pac. Rep. 570.

16. CONSTITUTIONAL LAW — Cigarette Tax.—The act entitled "An act to tax the business of trafficking in cigarettes or cigarette wrappers," is not in conflict with the constitution of Ohio, nor with the constitution of the United States.—METZ v. HAGERTY, Ohio, 38 N. E. Rep. 11.

17. CONSTITUTIONAL LAW—Game Law—Police Power. —Gen. Laws 1891, ch. 9, § 11, as amended by Gen. Laws 1893, ch. 124, § 9, prohibiting the having in possession, more than five days after the commencement of the closed season, certain kinds of game, although lawfully taken or killed during the open season is a proper exercise of the police power of the State to protect and preserve wild game, because reasonably tending to prevent the unlawful killing of such game during the closed season.—STATE v. RODMAN, Minn., 59 N. W. Rep. 1098.

18. CONTRACT — Breach—Damages.—Plaintiff bought stock of a national bank under an agreement with defendant that, at the end of a year, he would take it back, and repay plaintiff the price and interest. Plaintiff gave notice, and, at the end of the year, tendered the stock. Between the notice and the tender the bank became insolvent. After the tender the comptroller of currency levied an assessment on the stock which plaintiff had to pay: Held, in an action for breach of contract, that plaintiff could recover, not only the purchase price and interest, but also the amount of the assessment.—GAY v. DARE, Cal., 37 Pac. Rep. 466.

19. CONTRACTS—Consideration—Options.—An agreement to sell is sufficient to support a promise to pay an agreed amount for an option to purchase a mining claim, though the contract provides for liquidated damages in a like amount in case of refusal by the vendor to complete the sale, as the vendee may insist upon a specific performance.—MORRIS v. LAGERFELT, Ala., 15 South. Rep. 895.

20. CONTRACT—Damages—Profits.—Where a building contractor, who was to have received a leasehold interest in the building when completed, was prevented from completing the same by reason of the land being appropriated for a street, and recovered from the city certain specific damages, he cannot, in an action against the owner for breach of the building contract, recover the same damages.—LANAHAN v. HEAVER, Md., 29 Atl. Rep. 1037.

21. CONTRACT—Implied Warranty.—A company contracted with a city to do certain paving, the expense to be assessed against the abutting property. The city agreed to turn over to the company all assessments paid into its treasury, and to assign the remaining assessments to the company, which agreed to accept the same in payment of the amount due, with the further stipulation that "the city shall not be otherwise liable under this contract, whether the said assessments are collected or not." After both parties had complied with the contract, the statute authorizing the assessment was adjudged unconstitutional, and the company was unable to collect the sums unpaid: Held, that the contract gave rise to no implied warranty that the city had power to make the assessment, and it was not liable for the balance of the contract price.—BARBER ASPHALT PAVING CO. v. CITY OF HARRISBURG, U. S. C. C. (Pa.), 62 Fed. Rep. 565.

22. CORPORATIONS—Insolvency—Creditors.—A bill by individual creditors of an insolvent corporation, alleging that the directors, after assignment of the corporation, bought up, at a discount, debts against it, and asking to make them liable as trustees for the corporation in such purchases, and to subject the profits thus made to the payment of complainant's debts, is fatally defective, in failing to allege that the corporation or its assignee has wrongfully refused to institute suit.—MOULTON v. CONNELL-HALL MCLESTER CO., Tenn., 27 S. W. Rep. 672.

23. CORPORATIONS—Pledge of Stock—Power of Agent. —A general agent, with power to sell certain stock, cannot pledge it for his own benefit.—READ v. CUMBERLAND TELEGRAPH & TELEPHONE CO., Tenn., 27 S. W. Rep. 660.

24. CORPORATIONS— Preferring Creditors.—A corporation in failing circumstances may, in Missouri, prefer one creditor to another, in discharging its obligations, if such preference is made in good faith, while the property of the company remains in its possession, unaffected by liens or by process of law.—ALBERGER v. NATIONAL BANK OF COMMERCE, Mo., 27 S. W. Rep. 657.

25. CORPORATIONS—Stockholders.—Under Code Civ. Proc. § 359, requiring actions to enforce a liability against stockholders of a corporation to be brought within three years after the liability is created, an action to enforce the liability on a note of a corporation must be brought within three years of its date.—BANK OF SAN LUIS OBISPO v. PACIFIC COAST STEAMSHIP CO., Cal., 37 Pac. Rep. 499.

26. COUNTIES—Employing Counsel in Criminal Cases. —Neither under County Government Act, § 25, subd. 17, empowering the board of supervisors to direct the management of suits to which the county is a party, and to employ counsel to assist the district attorney therein, nor under *Id.* subd. 36, empowering it to authorize the district attorney to appoint an assistant, if need be, nor under any inherent general power undefined by statute, has the power to employ counsel to assist in the prosecution of criminal cases.—MODOC COUNTY v. SPENCER, Cal., 37 Pac. Rep 483.

27. COUNTY—Negligence.—An action against a county for damages under a statute must be brought while the statute is in force, as the repeal thereof takes away the right of action.—COPE v. HAMPTON COUNTY, S. Car., 19 S. E. Rep. 1018.

28. COVENANT OF WARRANTY—Measure of Damages.— In an action for breach of a covenant of warranty, it appeared that defendant placed with S lands for sale, —S to retain, as his commission, all over a fixed amount; that plaintiff bought some of the land, and took a contract from S, as agent; that, to facilitate the sale of the land, defendant conveyed the land to P, in trust to convey to such persons as S might sell to, the deed containing a covenant of warranty; and that plaintiff received a deed from the trustee: Held, that the warranty in the deed from defendant to P inured to the benefit of plaintiff, and that the measure of damages was the amount paid and interest, notwith-

standing a large part of this amount was retained by S as commission.—RASH v. JENNE, Oreg., 37 Pac. Rep. 539.

29. CRIMINAL EVIDENCE—Exclamations of Children—Res Gestæ.—Where a little child who, at 3 1-2 years of age, was a bystanding spectator of a homicide, proves, nearly two years subsequent to the occurrence, not to be possessed of sufficient comprehension and intelligence to be competent then to testify as a witness, its exclamations and utterances at the time of the homicide, even though they may have been part of the *res gestæ*, are not admissible in evidence through the mouth of a third person who heard such exclamations at the time; and this upon the ground that a child of such tender years, so lacking in intelligence and discrimination, cannot comprehend passing events with anything like such accuracy as to render its exclamations or observations in reference thereto at all reliable or admissible as evidence.—ADAMS v. STATE, Fla., 15 South. Rep. 905.

30. CRIMINAL EVIDENCE— Homicide—Declarations.—On a trial for murder by shooting, it is error to exclude declarations of defendant before the shooting showing that he believed the gun was not loaded.—JONES v. STATE, Ala., 15 South. Rep. 891.

31. CRIMINAL EVIDENCE — Perjury.—In a prosecution for perjury for testifying on the trial of one D for the larceny of a cow, that he met the cow going towards D's house early in the morning, and that D took it up, corroborative facts are insufficient without direct testimony of one witness that such meeting did not take place.—PEOPLE v. WELLS, Cal., 37 Pac. Rep. 529.

32. CRIMINAL LAW — Assault — Mitigating Circumstances.—It is error to refuse to charge that abusive words used by the person assaulted at or near the time of the assault might be considered in extenuation or mitigation.—SPIGNER v. STATE, Ala., 15 South. Rep. 892.

33. CRIMINAL LAW—Instructions—Reasonable Doubt.—On a criminal trial it is error to refuse to charge that each juror must be satisfied beyond a reasonable doubt that accused are guilty before they can convict.—CARTER v. STATE, Ala., 15 South. Rep. 893.

34. CRIMINAL LAW — Presumption of Intent.—On a trial for assault with intent to murder, a charge that, if defendant voluntarily assaulted the prosecuting witness with a deadly weapon, in such manner that the natural consequences would be the death of the witness, then the law presumes that the defendant intended to kill the witness, is error, as the question of intent is one of fact, to be decided by the jury.—PEOPLE v. LANDMAN, Cal., 37 Pac. Rep. 518.

35. CRIMINAL PRACTICE — Forgery—Indictment.—An indictment for passing a forged check, which fails to state that defendant knew the same was forged, is defective.—PEOPLE v. SMITH, Cal., 37 Pac. Rep. 516.

36. CRIMINAL PRACTICE—Obscene Papers.—An indictment under section 2620, Rev. St., which charges the accused with publishing and distributing an obscene paper containing an obscene figure or picture, should set out such paper in *hæc verba*, or give such description of the same as decency permits.—REYES v. STATE, Fla., 15 South. Rep. 875.

37. CRIMINAL TRIAL — Competency of Juror.—Jurors stated that they had formed opinions of the guilt or innocence of the accused from having heard what purported to be a detailed statement of the facts of the killing, but not from the witnesses, and, if taken into the jury box, would carry in their minds the opinions they had formed; and, assuming the evidence to be as detailed to them, they were then ready to render a verdict, but that they could readily and unhesitatingly render a verdict according to the evidence in the case if taken on the jury, notwithstanding the opinions they then entertained: Held, that they were competent jurors.—OLIVE v. STATE, Fla., 15 South. Rep. 925.

38. DEATH BY WRONGFUL ACT—Jurisdiction of Federal Courts.—Under a State statute giving a right of action for damages for death caused by wrongful act to the personal representative of the deceased, for the exclusive benefit of the widow and next of kin, an administrator, appointed in and a citizen of the State, may maintain such an action for the death of the intestate, against a citizen of another State, in a United States Circuit Court in that State.—MCCARTY v. NEW YORK, L. E. & W. R. CO., U. S. C. C. (N. Y.), 62 Fed. Rep. 437.

39. DEED — Failure to Record.—The failure of a grantee who is in possession of the land to record his deed does not render it void as to subsequent purchasers, as possession is notice to all the world of the holder's rights.—NEPONSET LAND & LIVE STOCK CO. v. DIXON, Utah, 37 Pac. Rep. 573.

40. DEED—Fraudulent Conveyance.—It is settled law in this State, as well as elsewhere, that marriage is a good consideration for a conveyance of real estate.—TOLMAN v. WARD, Me., 29 Atl. Rep. 1081.

41. DEED — Grant of Easement.—A deed to R, "his heirs and assigns, for the sole purpose of an alley way, to be used in common with the owners of other property adjoining said alley way," conveys only an easement, and dedicates the land for use as an alley-way.—PELTISSIER v. CORKER, Cal., 37 Pac. Rep. 465.

42. EASEMENT—Right of Way.—Where an owner of land lays off an alley extending into such land, marking its boundaries by fences, and conveys lots bordering thereon with an express grant of right of way through such alley, the rights of purchasers are presumed to extend to the limits of the alley so designated.—CURRIER v. HOWES, Cal., 37 Pac. Rep. 521.

43. EMINENT DOMAIN — Irrigation Company.—Laws 1887, p. 29, authorized plaintiff to construct waterworks for irrigation, and section 12 gave it power to acquire property "necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works, and all necessary appurtenances:" Held, to authorize taking land for constructing a pipe line.—RIALTO IRRIGATING DIST. v. BRANDON, Cal., 37 Pac. Rep. 484.

44. ESTOPPEL BY DEED.—Where a married woman represents that she is a widow, and, for a valuable consideration, executes a deed of land as a single woman, and after her husband's death, without consideration, deeds the land to her daughter, who has actual notice of the prior deed, the daughter is estopped from denying that her mother was a widow when the prior deed was executed.—RAMBOZ v. STOWELL, Cal., 37 Pac. Rep. 519.

45. EVIDENCE—Action on Note.—In an action on a note signed by two individuals, where defendants claim that it was delivered by mistake, a conversation between defendants at the time one of them signed it, plaintiff not being present, is not admissible as part of the *res gestæ*.—FLINT v. NELSON, Utah, 37 Pac. Rep. 479.

46. EVIDENCE—Comparison of Handwriting.—Laws N. Y. 1880, ch. 36, which provides that comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made "by witnesses," and that "such writings and the evidence of witnesses respecting the same may be submitted to the court and jury," does not authorize the submission of the writings to the jury without any comparison by witnesses.—GLENN v. ROOSEVELT, U. S. C. C. (N. Y.), 62 Fed. Rep. 550.

47. EVIDENCE OF CUSTOM.—Where both parties admit an express agreement as to where the logs were to be scaled and delivered, but the evidence as to the place of delivery is conflicting, evidence of a general custom, in case of a sale of logs, to scale and deliver them at the mill, is not admissible. — VOLLRATH v. CROW, Wash., 37 Pac. Rep. 474.

48. EXECUTION—Exemptions—Claim by Wife of Partner.—In the absence of a law limiting the time within which the wife must exercise the statutory exemption right in case her husband fails to make a demand

therefor within three days after receiving a notice of levy, a reasonable time thereafter will be allowed to such wife, in which to claim property exempt to herself and family; and, under the circumstances in this case, a demand made by the wives of the attachment debtors within 32 days from the expiration of the time allowed to the husbands is held to be not an unreasonable time.—NOYES v. BELDING, S. Dak., 59 N. W. Rep. 1069.

49. FEDERAL COURTS—Jurisdiction.—A Federal Court has no jurisdiction to disestablish a will admitted to probate in the State Court and establish one not admitted, where the State Courts of equity have no such powers.—CILLEY v. PATTON, U. S. C. C. (N. H.), 62 Fed. Rep. 498.

50. GARNISHMENT— School Board.—A board of education is not liable to garnishment for salary due a teacher, as Comp. Laws 1888, § 3455, authorizing the garnishment of corporations, applies only to private corporations.—CHAMBERLIN v. WATTERS, Utah, 37 Pac. Rep. 566.

51. GARNISHMENT — Sufficiency of Service.—In proceedings to attach funds on deposit in a bank which has assigned, service of the garnishment attachment on the trustees under the assignment is sufficient.—IRVINE v. DEAN, Tenn., 27 S. W. Rep. 666.

52. GUARDIAN'S BOND—Liability of Sureties.— Where the sureties of the guardian borrow money from the estate, the liability of the guardian must be determined before the sureties can be held.—HUMPHRIES v. GOSS, S. Car., 19 S. E. Rep. 1013.

53. INSURANCE— Contract.— A policy of insurance against fire, by its express conditions defining and fixing the relations between the parties thereto, furnishes the measure of their respective rights and liabilities, and the court cannot go outside of the conditions therein agreed to in order to determine the mutual or reciprocal obligations of the parties thereto.—DOVER GLASS-WORKS CO. v. AMERICAN FIRE INS. CO., Dela., 29 Atl. Rep. 1039.

54. JUDGMENT — Alteration after Affirmance. — A minority stockholder in a bank, in certain actions on behalf of himself and other stockholders against C, the majority stockholder, the bank and other defendants, recovered judgments against C "to and for the use of" the bank, and "to be paid to" the bank "for its use and benefit," together with "his costs and disbursements herein taxed," at sums stated: Held, that the trial court could not, after such judgments were affirmed on appeal, on plaintiff's petition, order the clerk to pay plaintiff his attorneys' fees in such cases out of the money paid to the clerk on the judgments.—WICKERSHAM v. CRITTENDEN, Cal., 37 Pac. Rep. 513.

55. JUSTICE OF THE PEACE—Jurisdiction.—Where a statute provides that a justice of the peace shall have jurisdiction in actions for the recovery of money where the amount "claimed" does not exceed $100 (2 Hill's Code, § 23), the interest due and claimed on the principal is part of the amount "claimed," within the meaning of the statute.—STATE v. SUPERIOR COURT OF KING COUNTY, Wash., 37 Pac. Rep. 489.

56. LIMITATION OF ACTIONS—Change in Statute.—Act Nov. 25, 1873, reducing the time within which an action on a note may be brought to six years, applies to an action on a note previously executed, but maturing after the passage of such act.—STODDARD v. OWINGS, S. Car., 20 S. E. Rep. 25.

57. MALICIOUS CONVERSION— Punitive Damages.—A judgment for punitive damages, in an action for the malicious conversion of certain wheat, peaceably taken by defendant under a *bona fide* claim of title, and by the advice of reputable counsel, will be set aside, where the only evidence of malice is a statement made by defendant at the time—that it was too rich for plaintiff to litigate with.—ABBOTT v. 76 LAND & WATER CO., Cal., 37 Pac. Rep. 527.

58. MASTER AND SERVANT—Fellow-servants.—A train dispatcher, employed by the division superintendent, though he has power to employ and discharge brakemen and flagmen, and has general charge of the movement of trains, is a fellow-servant of an engineer who is also subject to the instructions of the division superintendent.—NORFOLK & W. R. CO. v. HOOVER, Md., 29 29 Atl. Rep. 994.

59. MECHANICS' LIENS.—One in possession of land under contract for a deed is an owner within Laws, 1890, p. 24, § 1, establishing mechanics' lien, and providing that any person having an assignable interest shall be deemed an owner.—CARY-LOMBARD CO. v. SHEETS, Utah, 37 Pac. Rep. 572.

60. MECHANIC'S LIEN — Procedure—Judgment.—The statute regulating the foreclosure of mortgages by action (Gen. St. 1878, ch. 81), does not authorize, in addition to a decree of foreclosure, the docketing of personal judgment against the mortgagor, so as to become a lien on his other real estate, before sale of the mortgaged premises and the application of the proceeds upon the debt.—THOMPSON v. DALE, Minn., 59 N. W. Rep. 1086.

61. MECHANIC'S LIEN—Waiver.—Though a mechanic's lien for materials furnished attaches on the day the person commences to furnish the material, yet, where such person, after having filed a notice of lien therefor, though it was unnecessary, cancels the notice on being told by the owner that he cannot borrow money by mortgage unless the notice is canceled, and another loans money, taking a mortgage as security, and part of the money borrowed is paid to the person claiming the lien for material already furnished, he is estopped to claim that the mechanic's lien is prior to the mortgage, though he did not know who was going to loan the money.—SPARGO v. NELSON, Utah, 37 Pac. Rep. 495.

62. MINING LEASE—Execution by Superintendent.—Where a mining lease executed in the name of a corporation by its superintendent was turned over to defendant as successor in the ownership of the mine, and defendant, with knowledge as to how the lease was executed, allowed the lessee to work the mine for several months, and received the lessor's share of the proceeds, defendant will be deemed to have ratified the lease, and will not be allowed to question its validity because not executed under seal.—BICKNELL v. AUSTIN MIN. CO., U. S. C. C. (Nev.), 62 Fed. Rep. 432.

63. MORTGAGES—Enforcement by Surviving Partner.—A mortgage may be enforced by the survivors of a firm to which it was given.—YOUNTS v. STARNES, S. Car., 19 S. E. Rep. 1011.

64. MORTGAGES—Payment.—The presumption of payment of a mortgage arising from the lapse of more than 20 years after maturity is not rebutted by an admission that it was not paid, made by the mortgagor more than 20 years before suit was brought to foreclose it.—SIMMS v. KEARSE, S. Car., 20 S. E. Rep. 19.

65. MORTGAGES—Redemption.—Any one who has an interest in mortgaged premises, and who would be a loser by foreclosure, is entitled to redeem.—FRISBEE v. FRISBEE, Me., 29 Atl. Rep. 1115.

66. MORTGAGE BY MARRIED WOMAN.—Since the constitution gives a married woman an absolute power of alienation, as to her separate estate, she cannot impeach a sale made by a mortgagee under a power of sale contained in a chattel mortgage executed by her on her property, except for fraud, though such mortgage contains no declaration of her intention to bind her separate estate, as required by the act of 1887.—PHILLIPS v. OSWALD, S. Car., 20 S. W. Rep. 18.

67. MORTGAGE BY MARRIED WOMAN — Validity. — A mortgage made by a married woman will be held void where there is clear evidence that the money was advanced to buy supplies for her husband's farm, and the plaintiff fails to produce his books to show to whom the money was charged.—KUKER v. CARTER, S. Car., 20 S. E. Rep. 22.

68. MUNICIPAL CORPORATION — Contracts — Ultra

Vires.—As the authority of a municipal corporation to make a contract not void on its face will be presumed, the defense of *ultra vires*, in an action thereon, must be raised by answer.—BROWN v. BOARD OF EDUCATION OF CITY OF POMONA, Cal., 37 Pac. Rep. 503.

69. MUNICIPAL CORPORATION—Contract—Validity.—A contract made by the city council of the city of Minneapolis for lighting the streets of that city for a term of five years is, under the charter of that city, void, unless the funds on hand and the taxes actually levied when the contract was made were sufficient to cover all the liability incurred by the contract, and payable during the five years, and also to cover the current expenses and other existing liabilities of the fiscal year for which such taxes were levied.—KIICHLI v. CITY OF MINNEAPOLIS, Minn., 59 N. W. Rep. 1088.

70. MUNICIPAL CORPORATION—Organization—Control of Schools.—When a city incorporated under a special charter becomes "organized under the general act providing for the incorporation of cities," by a majority vote of its electors, it is thereafter governed by the provisions of the general school law of 1891, and any special act providing for a board of education in such city thereafter ceases to be in force in such city.—STATE v. POWER, S. Dak., 59 N. W. Rep. 1090.

71. MUNICIPAL IMPROVEMENTS — Assessment — Contract.—In an action by a town to foreclose a lien growing out of an assessment for the improvement of a street the plaintiff must show that a contract for the work had been actually entered into, and it is not sufficient to show that the common council opened bids and awarded the work.—TOWN OF HAMILTON v. CHOPARD, Wash., 37 Pac. Rep. 472.

72. MUNICIPAL IMPROVEMENTS—Grading Street.—The omission to establish the grade of a street is an irregularity which does not go to the jurisdiction of the District Court to enter a tax judgment to recover a special assessment made under the charter of Duluth for the purpose of grading and improving such street, and such judgment cannot be attacked in a collateral proceeding on account of such omission.—FITZHUGH v. CITY OF DULUTH, Minn., 59 N. W. Rep. 1041.

73. MUTUAL BENEFIT INSURANCE—Illegal Beneficiary.—Where a member of a benefit society designates a creditor as the beneficiary in a certificate issued to him, in violation of the statute, the whole contract is not void; and the executrix of such member's estate is entitled to the money due on the certificate, in trust for the benefit of those who, at the time the contract was made, were entitled to be named as beneficiaries.—CLARKE v. SWARTZENBERG, Mass., 38 N. E. Rep. 17.

74. NEGLIGENCE — Contributory Negligence.—The rule that plaintiff cannot recover if himself guilty of negligence contributing to his injury, though not applicable where defendant, by the exercise of reasonable care, might have avoided the consequences of plaintiff's negligence, applies, without qualification, where the party inflicting the injury is not chargeable with negligence indulged after the position of the injured party was discovered, or, by the exercise then of reasonable care, would have been discovered.—TEXAS & P. RY. CO. v. NOLAN, U. S. C. C. of App., 62 Fed. Rep. 552.

75. NEGLIGENCE—Independent Contractors—Loading Passengers' Baggage.—Stevedores bringing passengers' baggage on board a steamship, and placing it where requested by passengers for their convenience, are not exercising an independent employment, but are performing a duty which rests on the ship, and it is the duty of the ship's officers to see that risk of accident to persons on board is avoided.—THE DRESDEN, U. S. D. C. (Md.), 62 Fed. Rep. 438.

76. NEGLIGENCE OF INDEPENDENT CONTRACTOR.—A town, which through its supervisors, enters into a contract with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages caused by the negligence of said contractor when burning the brush.—SHUTE v. TOWN OF PRINCETON, Minn., 59 N. W. Rep. 1050.

77. NEW TRIAL—Filing Decisions.—Under Code § 286, *et seq.*, which provides that a motion for a new trial "must be heard and decided" at the same term, a decision on such a motion may be filed after the term *nunc pro tunc*, where it was heard and argued during the term, though pending the decision a judgment was entered on the verdict.—CALHOUN v. PORT ROYAL & W. C. RY. CO., S. Car., 20 S. E. Rep. 30.

78. ORDER—What Constitutes.—When goods are sold on defendant's written promise to accept an order drawn by the purchaser for their amount, the indorsement of the purchaser's name upon such promise is not an order on which defendant is liable.—ALLEN v. LEAVENS, Oreg., 37 Pac. Rep. 488.

79. PARTITION—Sale.—The sale of lands in partition cannot be ordered where defendant holds adversely to plaintiff under a claim of title founded on disputed facts.—KILGORE v. KILGORE, Ala., 15 South. Rep. 897.

80. PARTNERSHIP — Parol Agreement.—Plaintiff erected on his ward's premises fish wheels, and operated them for his own benefit. Upon majority of the ward, it was agreed by parol to operate the wheels in partnership, plaintiff to have a half interest in the wheels and premises. Nothing was paid by plaintiff or the partnership for such property: Held, in an action to dissolve the partnership, that, there being no written instrument conveying such interest, as required by Hill's Ann. Laws, § 781, the fish wheels, being realty, were not partnership property.—DODSON v. DODSON, Oreg., 37 Pac. Rep. 542.

81. PRACTICE—Placing Case on Calendar.—Where the relief asked for is damages on account of a nuisance, and an injunction restraining the same, the cause should be placed on the calendar on which jury cases are placed, as the question of damage should be settled before the right to injunction exists.—TREATT v. BREWER MIN. CO., S. Car., 19 S. E. Rep. 1009.

82. PROCESS — Writs — Notice of Motion.—Where a summons has been properly served, but the proof of service is defective, the court may, after judgment, allow an amended affidavit of service to be filed *nunc pro tunc* as of the date of the judgment.—HERMAN v. SANTEE, Cal., 37 Pac. Rep. 509.

83. PUBLIC LANDS—Annulment of Entry—Land Office.—A decision by an officer of the executive branch of the government, cancelling an entery after it has been allowed and the land paid for, and before the legal title has passed from the government, is not binding on the courts if supported only by a general conclusion that fraud has been committed, and that the entery was not made in good faith, with intent on the part of the entryman to take the land for his exclusive use and benefit.—STIMSON LAND CO. v. RAWSON, U. S. C. C. (Wash.), 62 Fed. Rep. 426.

84. QUO WARRANTO — Application by Private Individual.—A private individual may bring *quo warranto* to oust defendant from public office only when he is himself a claimant to the office.—STATE v. TAYLOR, Ohio, 38 N. E. Rep. 24.

85. RAILROAD COMPANIES—Accidents at Crossings.—When a person riding in a covered wagon along a road which crosses a railroad track at an angle looks listens, and, while he is looking ahead, and is very near the crossing, a train, out of time, comes up to the crossing from behind the wagon at the rate of 50 miles an hour, without any signal, he is not blamable for driving across the track in front of the train, instead of stopping or turning out in some other direction, even though he ought, by the exereise of ordinary care, to have seen the train when he was within 90 feet of the crossing.—CHICAGO, ST. L. & P. R. CO. v. BUTLER, Ind., 38 N. E. Rep. 1.

86. RAILROAD COMPANY— Electric Street Railroad—Negligence.—In an action against a street-car company for the death of a child, about six years old, on a street

crossing near a school, it appeared that while children were playing near the track the car was run over the crossing at a rate of 10 miles an hour. The evidence left it uncertain as to whether the child suddenly appeared on the track in front of the car: Held, that a nonsuit was properly refused.— WALLACE v. CITY & SUBURBAN RY. CO., Oreg., 37 Pac. Rep. 477.

87. RAILROAD COMPANIES—Killing Stock—Pleading.—A declaration alleging that it was the duty of a railroad company to use good care in running and managing its locomotives and trains, and disregarding its duty in that respect, so negligently and carelessly ran and operated a locomotive and train of cars on a day mentioned, and in a designated town on the road, as to strike and kill a mule of plaintiff, states a cause of action and will be good on demurrer.—JACKSONVILLE, T. & K. W. RY. CO. v. JONES, Fla., 15 South. Rep. 924.

88. RAILROAD COMPANIES — Mortgages — Trustees—Compensation.—On maturity of bonds secured by a railroad mortgage after most of them had been retired, and the holders of nearly all outstanding had agreed to an extension of time, the trustee of the mortgage, on his motion, and without request by the bondholders, brought suit to foreclose. The suit was never prosecuted to a decree, proceedings on a second mortgage being afterwards instituted in the Federal Court: Held, that the suit by the trustee was unnecessary, and he should not be allowed compensation or counsel fees therefor.—BOUND v. SOUTH CAROLINA R. CO., U. S. C. C. (S. Car.), 62 Fed. Rep. 537.

89. RAILROAD COMPANY—Release of Right of Way.—A railroad company may, when it is no longer needed for its use, release its easements for right of way to the owner of the land.—FLATEN v. CITY OF MOORHEAD, Minn., 59 N. W. Rep. 1044.

90. RAIDROAD COMPANY—Street Railroad—Injury to Child.—In an action by a parent against a street railway for injuries to his minor child, it appeared that plaintiff was in moderate circumstances, and sent the child, who was about three years old, to play under the care of its nine year old brother. The child was hurt while crossing the street alone to its mother, who had called the children: Held, that it was for the jury whether plaintiff was guilty of contributory negligence.—HEDIN v. CITY & SUBURBAN RY. CO., Oreg., 37 Pac. Rep. 540.

91. RAILROAD COMPANIES— Taxation.—When a railroad company, empowered by charter to build its road between termini in different counties, lays its tracks at one terminus on a wharf, and the whole railroad is assessed by the State board of equalization, pursuant to Const. art. 13, § 10, providing that the roadbed, rails, and rolling stock of all railroads operated in more than one county shall be assessed by that board, an assessment of the wharf by the county tax collector does not constitute double taxation, since the wharf is not a necessary part of the railroad, and brings in a separate income.—PACIFIC COAST RY. CO. v. RAMAGE, Cal., 37 Pac. Rep. 532.

92. REAL ESTATE AGENTS—Commissions.—Where an agent's authority to sell lands upon certain terms is revoked, and the owner, in good faith, thereafter sells upon less favorable terms to one who had declined to purchase from the agent, such agent is not entitled to commissions.—BAILEY v. SMITH, Ala., 15 South. Rep. 901.

93. RECEIVER—Appointment.— An order appointing a receiver, made on Sunday, without notice and before the complainant has filed his bill, is invalid.—BARBER v. MANIER, Miss., 15 South. Rep. 890.

94. RECEIVER—Counsel Fees and Expenses.—Where a receiver employs counsel on his own responsibility, an allowance will not be made him therefor, unless he has actually paid such fees, though they were necessary, and such as the court would have authorized if application had been made in advance.—HENRY v. HENRY, Ala., 15 South. Rep. 916.

95. REMOVAL—Jurisdiction.—An action was brought by a city in a State court to recover a tax of $2 for each of 509 telegraph poles maintained in the streets, but the declaration concluded: "And plaintiffs claims $10,000:" Held, that the actual amount in dispute was but the amount of the tax, $1,018, and a Circuit Court could not take jurisdiction by removal.—MAYOR, ETC., OF BALTIMORE v. POSTAL TEL. CABLE CO., U. S. C. C. (Md.), 62 Fed. Rep. 500.

96. REMOVAL OF CAUSES — Time of Application — Amendment Stating New Cause. — A suit between citizens of different States may be removed in due season after an amendment stating a new and different cause of action, in which the original suit is merged, although the time within which it might originally have been removed has expired.—MATTOON v. REYNOLDS, U. S. C. C. (Conn.), 62 Fed. Rep. 417.

97. RESULTING TRUSTS—When Agent Becomes Trustee.—An agent who acquires property for a consideration furnished by his principal, and takes the title in his own name, holds it as trustee for the principal; and, in general, when the title to property purchased is taken to one or more persons, and the consideration, or an aliquot part thereof, is paid by another, a trust results in favor of the latter.—GASHE v. YOUNG, Ohio, 38 N. E. Rep. 20.

98. SALE — Stoppage in Transitu.—When goods have arrived at the destination contemplated by the vendor and vendee at the time of the sale and consignment, and a new transit, to a new destination, is put in operation by the latter, then the original transit is ended, and likewise the right of stoppage *in transitu*. But an order for delivery of the goods at a particular warehouse or point within the original destination cannot ordinarily be a direction to start the goods to another destination.—LEWIS v. SHARVEY, Minn., 59 N. W. Rep. 1096.

99. SALES OF PROPERTY TO BE APPRAISED.—Claimant, being surety for defendant on certain notes, paid them in consideration of a sale to him of defendant's stock of goods, the goods to be thereafter appraised, and any excess or deficiency in amount made good to the proper party. The goods were delivered to claimant, but before completion of the appraisement plaintiff levied an attachment against defendant thereon: Held, that title had passed to claimant.— FRANCIS CHENEWORTH HARDWARE CO. v. GAY, Ala., 15 South. Rep. 911.

100. SCHOOL DISTRICTS—Officers—Authority to Sue.—Under Rev. St. Mo. §§ 8040-8042, making it the duty of the State board of education, when it shall be ascertained that the objects of the grant of school lands have been violated, to institute suits in the name of the State to prevent such violations, and authorizing the board to employ an attorney to prosecute such suits, an attorney appointed by the board cannot maintain a suit for such purpose without the direction of the board, based on its ascertaining the existence the facts authorizing the institution of suit; and failure of the board to disaffirm the bringing of a suit by the attorney does not amount to a ratification.—STATE OF MISSOURI v. LUCE, U. S. C. C. (Mo.), 62 Fed. Rep. 417.

101. SET-OFF— Corporations — Contract.—Where a railroad company, as an inducement to establish a baseball park, to increase its traffic, executes its note, and exacts in return a contract secured by a bond providing for the payment of the note on failure to perform the contract, the principal and sureties, when sued on the bond, are entitled to set-off against the amount of the note, with interest, any money paid pursuant to the contract.—TEMPLE ST. CABLE RY. CO. v. HELLMAN, Cal., 37 Pac. Rep. 530.

102. SLANDER—Evidence.—In an action for slander, proof of words, equivalent to those charged, or words of similar import, is insufficient, as the identical words charged must be proved.—ROBERTS v. LAMB, Tenn., 27 S. W. Rep. 668.

103. SLANDER—Words Actionable per Se.—It is ac-

tionable *per se* to charge one with setting fire to a wood yard in which is located a warehouse, as such act is arson, under Pen. Code, §§ 447, 448.—CLUGSTON v. GARRETSON, Cal., 37 Pac. Rep. 469.

104. SODOMY.—An information which charges that defendant committed the crime against nature in and upon the "person" of Carl K sufficiently states that it was committed with a human being, as distinguished from an animal.—PEOPLE v. MOORE, Cal., 37 Pac. Rep. 510.

105. SPECIFIC PERFORMANCE — Sale of Stock.—It is sufficient for a bill for specific performance of a sale of stock to allege that complainant cannot obtain the stock elsewhere than of respondent, without alleging that the stock was not on the market, or that complainant has made effort to obtain other such stock.—MANTON v. RAY, R. I., 29 Atl. Rep. 998.

106. SPECIFIC PERFORMANCE — Uncertainty of Contract.—A verbal agreement with owners of property under which plaintiff is to procure a company to operate it, "upon a basis the details of which were to be thereafter agreed upon," cannot be enforced, for uncertainty.—WHITEHILL v. LOWE, Utah, 37 Pac. Rep. 589.

107. TAXATION OF NATIONAL BANK STOCK.—On an assessment of bank stock under 1 Hill's Code Wash. §§ 1038 1040, making banks agents for their respective shareholders, and authorizing the collection from each bank of taxes on its stock assessed against it as such agent, if the statute is not complied with by charging the bank on the assessment roll, and it is not even referred to by its proper corporate name in the assessments against its shareholders, the warrant to the collector confers no authority to seize the property of the bank for the purpose of enforcing payment of taxes charged against shareholders.—FIRST NAT. BANK OF WALLA WALLA v. HUNGATE, U. S. C. C. (Wash.), 62 Fed. Rep. 548.

108. TAXATION—Exemption. — Under the exemption ordinance (Const. Nov. 1, 1890), which provides that all permanent factories "hereafter established" shall be exempt from taxation, and that any factory which has been abandoned for not less than three years, and commencing operations within a certain time, shall also be exempt, a factory which has been in continuous operation since before the adoption of the constitution is not exempt.—YOCONA COTTON MILLS v. DUKE, Miss., 15 South. Rep. 929.

109. TAXATION — Municipal Corporations. — Lands owned by a city are not taxable, being exempt under 1 Comp. Laws, § 2009.—CITY OF SPRINGVILLE v. JOHNSON, Utah, 37 Pac. Rep. 577.

110. TAX SALE—Prima Facie Title.—A purchaser at a tax sale, in good faith, who has a title from the competent and proper officer, valid in form, and without patent defect, and who have been in possession for 10 years, may under the constitutional provisions of the State of Louisiana (article 210), defeat the claim of the original owner, although the tax deed was insufficient, by reason of informalties attendant upon the advertisement and sale of the property in question.—WILLIAMS v. WILLIAM J. ATHENS LUMBER CO., U. S. C. C. (La.), 62 Fed. Rep. 558.

111. TENDER — Sufficiency.—Payment into court of less than the amount due will not stop the running of interest.—MCCALLEY v. OTEY, Ala., 15 South. Rep. 945.

112. TOWNS—Bridges — Defects.—While the duty to repair and maintain highways and bridges may in this State devolve upon civil townships, and while such townships may, within certain limits, be empowered to raise revenue for such purpose, yet, in the performance of such duty, the township acts as the instrumentality of the State, and, in the absence of any statute fixing liability, the township shares with the State that immunity from liability for the acts or negligence of its officers which the State enjoys.—VAIL v. TOWN OF AMENIA, N. Dak., 59 N. W. Rep. 1092.

113. TRUSTS COMPANIES—Sureties on Appeal Bonds.—Section 7, ch. 3, Laws 1885, making it lawful for an "annuity safe deposit and trust company" to become sole surerty upon any bond or undertaking "without justification or qualification," is only permissive, and does not make it compulsory on the court to accept it as surety without justification, or deprive the court of the power to require it to justify, if its sufficiency as surety is excepted to.—PEOPLE'S BANK OF MINNEAPOLIS v. MUTUAL INV. CO., Minn,, 59 N. W. Rep. 1055.

114. TRUST DEED — Foreclosure by Suit.—The beneficiary of a trust deed with power of sale given as security for a loan may sue in equity to foreclose the same, as the power of sale is merely cumulative to such right.—DUPEE v. ROSE, Utah, 37 Pac. Rep. 567.

115. VENDOR AND PURCHASER — Delivery of Deed.—Where a vendor has received the purchase money on a contract for the sale and conveyance of real property, no time within which a conveyance shall be made being specified in the contract, he is entitled to reasonable time in which to execute and deliver the deed; and ordinarily, in such cases, there should be a demand for the deed, and, a refusal to deliver it before suit is brought to recover the purchase money.—MC NAMARA v. PENGILLY, Minn., 59 N. W. Rep. 1055.

116. VENDOR AND PURCHASER—Rescission of Contract.—In an action to rescind a contract for the sale of land, which provided that the grantor was to build a levee along a river, whether the levee was completed within a reasonable time is a question for the court sitting as a jury; and, in the absence of any proof of damages to the grantee from failure to complete the same a finding that it was completed within a reasonable time will not be disturbed, though the work was not completed for four years.—QUILL v. JACOBY, Cal., 37 Pac. Rep. 524.

117. WATER RIGHTS—Adverse Use of Water.—An uninterrupted adverse use of the water of an artificial aqueduct for 20 years is sufficient to create a prescriptive right to the enjoyment of it to the extent of such use the same as if the water had flowed in a natural channel; and the term of enjoyment requisite for the prescription is deemed to be uninterrupted when it is continued from ancestor to heirs and from seller to purchaser.—COLE v. BRADBURY, Me., 29 Atl. Rep. 1097.

118. WATERS—Irrigation District—Collateral Attack.—The organization of an irrigation district cannot be collaterally attacked in an action by landowners to enjoin the collection of assessments by the officers of the district.—QUINT v. HOFFMAN, Cal., 37 Pac. Rep. 514.

119. WILLS—Construction — Certainty as to Beneficiary.—A bequest of a certain sum to an incorporated missionary society whose whole mission work is divided into two branches, domestic and foreign, is not rendered void for uncertainty of beneficiary or purposes by the addition of a direction to apply it to domestic missions, as such legacy is not to be considered as held upon any trust, but to be expended by the corporation in its regular domestic mission work, as distinguished from its foreign mission work.—DOMESTIC & FOREIGN MISSIONARY SOC. OF PROTESTANT EPISCOPAL CHURCH IN UNITED STATES OF AMERICA v. GAITHER, U. S. C. C. (Md.), 62 Fed. Rep. 422.

120. WILLS — Estate Given.—A devise to a married woman to have and to hold to her sole and separate use, free from interference or control of her husband, and to her heirs and assigns, gives her a fee, not a life estate with remainder to her heirs.—CRESSY v. WALLACE, N. H., 29 Atl. Rep. 842.

121. WITNESS—Examination—Memoranda.—A memorandum of the contents of a trunk, made from an inspection seven months after the same was deposited for storage, and after the sale thereof for storage charges, cannot be used by a witness to refresh his memory as to the contents of the trunk and the value thereof at the time they were deposited for storarge.—BERGMAN v. SHOTDY, Wash., 37 Pac. Rep. 453.